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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 102

ROBINS DRY DOCK & REPAIR COMPANY,
PETITIONER,

vs.

GEORGE FLINT, SAMUEL W. COLLINS, AND
LUDWIG T. BREHM, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 2, 1926

CERTIORARI GRANTED OCTOBER 25, 1926

(32,113)

certificate
6 Sup. 433

(32,113)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 546

ROBINS DRY DOCK & REPAIR COMPANY, PETITIONER,

vs.

GEORGE FLINT, SAMUEL W. COLLINS, AND LUDWIG T. BREHM, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Original Print

[fols. a & 1]

IN UNITED STATES DISTRICT COURT. SOUTHERN DISTRICT OF NEW YORK

George Flint, Samuel W. Collins, and Ludwig T. Belhm, Doing Business under the Name of Flint, Collins & Co., Inc., a Limited Partnership, Libelants,

against

Rouse Dry Dock & Repair Company, Respondent

Docket Entries

1920.
July 30 Libel filed.

1921
Aug. 2 Answer and interrogatories filed.

1923
Oct. 31 Trial before Hon. Henry W. Goddard, D. J.

1924
Apr. 2 Opinion rendered in favor of Libelant.
June 16 Interlocutory decree entered.
Oct. 20 Reference begins before Mark W. Maclay, Jr., Esq., Commissioner.
[fol. 2]

1925
Feb. 3 Reference resumed.
May 14 Reference resumed.
May 21 Reference concluded.
Aug. 27 Commissioner's report filed.
Sept. 30 Final decree entered.
Oct. 15 Notice of appeal filed.
Oct. 16 Assignment of errors filed.

In United States District Court

Libel

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The libel of George Flint, Samuel W. Collins and Ludwig T. Belhm, doing business under the name of Flint,

Goering & Co., Ltd., a limited partnership against Robins Dry Dock & Repair Company, in a cause of contract and damage, civil and maritime, alleges as follows:

First: The libellants at all the times hereinafter mentioned were and still are copartners, doing business as a limited partnership, under the firm name and style of Flint, Goering & Co., Ltd., engaged, among other things, in the business of chartering and operating steamships, and having their principal place of business in the City of Philadelphia.

Second: The respondent, Robins Dry Dock & Repair Company, at all the times hereinafter mentioned was and still is a New York corporation engaged in business as a shipwright and having a shipyard and dry docks at Erie Basin, and an office in the City and Southern District of New York.

Third: On or about July 29, 1915, the Norwegian steamship Rosecrans, of which the libellants were time-chartered owners under a charter party dated on or about September 15, 1913, was delivered to the respondent for drydocking, cleaning, painting and certain repairs, for a certain compensation to be paid therefor, pursuant to an agreement which had been entered into between the respondent and the owners of said steamship, which agreement was made for the benefit of the libellants and was incidental to the aforesaid charter party of September 15, 1913.

The respondent received said steamship and undertook to perform said work with reasonable dispatch and in a skilful, careful and workmanlike manner.

Fourth: After said steamship was delivered to the respondent on or about July 29, 1915, it was discovered in her propeller by reason whereof it became necessary to install the spare propeller on board said steamship, which work the respondent undertook to perform.

Said spare propeller could not be installed by reason partly and all the other work hereinafter and aforesaid was delivered to the respondent completed said steamship to be delivered to the libellants from the respondent's [illegible] on August 4, 1915.

Fifth: The respondent, notwithstanding the aforesaid obligations did not perform the aforesaid work in a skilful,

careful and workmanlike manner, but on the contrary the respondent, its agents and servants, conducted themselves therein in a careless and negligent manner and in the course of installing the aforesaid spare propeller recklessly and negligently permitted the same to fall, thus breaking one of its blades and making it useless, by reason whereof it became necessary to have a new propeller cast, and said steamship was delayed and detained until 3 p. m., August 15, 1917, to the libellants' damage in the sum of $33,068.38 or thereabouts, with interest, payment of which has been duly demanded but refused.

Sixth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore the libellants pray that process may duly issue against the respondent Robins Dry Dock & Repair Company, citing it to appear and answer this libel and that this Court will make a decree in favor of the libellants for their damages, as aforesaid, with interest and costs and will give the libellants such other and further relief as may be just.

H. Alan Dawson, Burlingham, Veeder, Masten & Fearey, Proctors for Libellants.

[fol. 2] *Duly sworn to by E. and H. Happer. Jurat omitted in printing.*

[fol. 3] In United States District Court

Answer

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The answer of Robins Dry Dock & Repair Company to the libel of George Flint, Samuel W. Collins and Ludwig T. Brehm, alleged to be doing business under the name of Flint, Goering & Co., Ltd., as a limited partnership, against Robins Dry Dock & Repair Company, in an alleged cause of contract and damage, civil and maritime, as follows:

I Respondent has no knowledge nor any information sufficient to form a belief as to any of the allegations of the first article of the libel.

II Respondent admits the allegations of the second article of the libel.

III Upon information and belief, respondent denies the allegations of the third article of the libel, except as herein-after specifically admitted.

IV Upon information and belief, respondent denies the allegations of the fourth paragraph of the libel, except as hereinafter specifically admitted in connection with respondent's allegations as to the contract between respondent and the [illegible] and [illegible] Corporation [illegible] relative to her [illegible] contract not pending.

[illegible] V Respondent admits that the work referred to in articles fourth and fifth of the libel relating to the installation of the steam propeller was unprofitably and negligently performed, in that the said steam propeller was permitted to fall and break out of the bushing by reason whereof it became necessary to have a new propeller cast and said steamship was delayed and detained until [illegible] August 15, 1912, that [illegible] a period of fourteen days but respondent denies any knowledge or any information sufficient to form a belief as to any of the remaining allegations of article fifth of the libel, except the allegation with reference to demand and [illegible] which allegations are admitted.

VI Upon information and belief, respondent denies that all and singular the premises in the said libel contained are true, as alleged in the [illegible] of the libel, but admits the allegation that [illegible] jurisdiction of the United States and of this Honorable Court [illegible] and avers allegation.

Further answering the libelant herein, the respondent alleges upon information and belief as follows:

VII Prior to June 28, 1912, the owners of the Norwegian steamship [illegible] of which libelants were chief engineers, by a form of charter party not amounting to a

demised, and the respondent entered into a contract under and in accordance with which this respondent undertook to dock said steamship "Borgefjord," clean her bottom and [illegible] do certain painting, and said steamship was accordingly drydocked by this respondent and in the course of the performance of the work agreed to be done by this respondent under said contract a crack was discovered in the propeller of said steamship and said propeller was condemned by the Lloyds and Veritas Classification services. The owners (and the charterers) of the said steamship thereupon employed this respondent to install the steamer's spare propeller, and this respondent in doing so, through its servants, July 31, 1917, negligently let said spare propeller fall, with the result that it was so injured that a new propeller had to be cast.

VIII. The charter party between libelants and the owners of said Norwegian steamship "Borgefjord" contained inter alia the following provisions:

"(1) That the Owner shall [illegible] maintain her in a thoroughly efficient state in hull and machinery for and during the service.

"(6) That in the event of loss of time from [illegible] breakdown of machinery, [illegible] or damage preventing the working of the Vessel for more than twenty-four consecutive hours, the payment of hire shall cease until she be again in an efficient state to resume her service.

"(7) [illegible] The act of God, [illegible] and all dangers and accidents of [illegible] Machinery [illegible] throughout this Charter Party, always mutually excepted.

"(8) [illegible] That the Steamer may [illegible] time employed in tropical waters during the term of this Charter. Steamer is to be docked [illegible] bottom cleaned and painted, whenever [illegible] Owners and Master [illegible] at least once every [illegible] months, and payment for the [illegible] to be suspended until [illegible] is made in proper dock for the purpose."

The Steamer had been withdrawn since August 22nd and charter party above quoted to be docked, her bottom cleaned and painted by this respondent.

knowledge nor any information as to the exact ownership of said steamship "Bjornefjord" or as to her relations, if any, by charter party or otherwise, to the libelants in [fol. 11] this case, and in making said payment to said master and in taking the release executed by said master this respondent procured said master to execute said release as above stated in full settlement of all the claims of said master, as master or otherwise, and all claims of the owners, &c. of said steamship "Bjornefjord," to wit: all parties having any property interest in said steamship. A copy of said general release is hereto annexed marked "Schedule A" and made a part of this answer. In addition to making said payment in consideration of the release by said master as above, this respondent abscond said steamship and installed the new propeller that had been cast without charge being made therefor against said master or the owners of said steamship.

XIII. That it will appear from the charter party between libelants and the owners of said Norwegian steamship "Bjornefjord" that during the off hire periods provided for in and by the terms of said charter party libelants were not in possession of said steamship, were not entitled to the use of said steamship and were not again entitled to the use of said steamship until said off hire periods should terminate.

XIV. That the libelants [illegible] rights to the contract between this respondent and the owners of the said steamship "Bjornefjord" [illegible] with which this respondent [illegible] and is not bound upon her.

[fol. 12] XV. That respondent was a stranger to the contract of charter party between the owners of said steamship and the libelants herein, and this respondent alleges upon information and belief that if the negligence of this respondent's employees as above mentioned prevented the owners of the steamship "Bjornefjord" from performing the said contract of charter party or otherwise with libelants herein during the said period of "off hire" delay or any other such period, respondent is not [illegible] to the libel

suits for any damages the libelants may have sustained in that behalf.

XVI. All and singular the premises are true.

Wherefore respondent prays that the libel herein may be dismissed, with costs.

Barry, Wainwright, Thacher & Symmers, Proctors for Respondent, 59 Wall Street, Borough of Manhattan, City of New York.

Duly sworn, etc. (by Wallace F. Gallien). *Jurat omitted in printing.*

[fol 13] Exhibit to Answer

Interrogatory Propounded by Respondent to be Answered by Libelants under Oath

First Interrogatory. Please set forth a copy of the contract of charter party between libelants and the owners of the steamship "Burnet Lord" under which said steamship was being operated or used immediately prior to the delivery of said steamship at the respondent's dock or yard and after the redelivery of said steamer upon the completion of the work done thereon by respondent.

Second Interrogatory. Please state in detail how the amount of damages claimed in the libel was arrived at, stating the items thereof in detail.

Third Interrogatory. Was written claim or claims that notice was first given by or on behalf of libelants to the respondent of the alleged fact that libelants herein had any claim for damages such as is set up in the libel or otherwise? (fol 14) If it is claimed that such notice was given in writing, attach a copy of the notice to your answer to this interrogatory and state how such notice is claimed to have been delivered to respondent. If it is claimed that such notice was given orally, state when, where, by whom and to whom such notice is claimed to have been given.

Barry, Wainwright, Thacher & Symmers, Proctors for Respondent.

Schedule A to Answer

To all to whom these presents shall come or may concern, Greeting:

Know Ye, That I, Rasmus Rasmussen, as master of the Norwegian S. S. "Bjornefjord" for and in consideration of the sum of Three Thousand two hundred and seventy one 21 100 dollars ($3,271.21 100), lawful money of the United States of America to me in hand paid by The Robins Dry Dock & Repair Company, a corporation, the receipt whereof is hereby acknowledged, have remised, released, and forever discharged, and by these presents do for said Steamship, her owners, &c., and myself, my heirs, executors and administrators remise, release and forever discharge the said Robins Dry Dock & Repair Company, its servants, agents, successors and assigns of and from all manner of action and actions, cause and causes of action, suits, debts, dues, sums of moneys, accounts, reckoning, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law or in equity, which against said Robins Dry Dock & Repair Company, [fol. 15] I, as master or otherwise, and the owner &c. of said S. S. "Bjornefjord" ever had, now have or which they or I, our successors, assigns, heirs, executors or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents, and especially of and from all claims and demands arising out of towage and or detention of said steamship in any way due to the breaking of propeller on said vessel on or about July 31, 1917.

In witness whereof, I have hereunto set my hand and seal the seventh day of December in the year one thousand nine hundred and seventeen.

Th. Jullum.

Sealed and delivered in the presence of R. Rasmussen as Master.

State of New York,
County of New York, ss:

On this 7th day of December, 1917, before me personally appeared Rasmus Rasmussen, as master of the Steamship "Bjornefjord" to me known, and known to me to be the same person described in and who executed the within instrument and he duly acknowledged to me that he executed the same, as master as aforesaid.

William H. Wilson, Jr., Notary Public, Kings County, No. 180. Kings County Register's No. 9656. Certificate filed in New York County No. 241. New York County Register's No. 9291. Commission expires March 30, 1919.

[fol. 16] In United States District Court

[Title omitted]

Libellants' Answer to Interrogatories

First. A copy of the charter party dated September 13, 1913, is annexed hereto.

Second. The damages of $35,000.00, as claimed in the libel, are figured on the basis of the difference between what the libellants would have been obliged to pay the owner of the steamer under the charter of September 13, 1913, except for the fourteen days loss of use of said steamer (which was $2,347.76 or thereabouts) and the market value of said steamer for said period (which was $35,580.74 or thereabouts). The libellants reserve all rights as to increasing the amount of damages or otherwise.

Third. (a) Before August 10, 1917, and on that date or [fol. 17] thereabouts notice was delivered by a letter dated August 10, 1917, reading as follows:

"Confirming our previous advices to you we are the time chartered owners of the Norwegian Steamship Bjornefjord, and have been kept out of the possession and will lose the use of this ship by reason of the breaking of her propeller on or about August 1 while you were making

repairs to her, due, we are informed, to your negligence. In consequence thereof the vessel will be detained at your yard for a considerable period.

Our loss through this detention, based upon the market value of the ship, and her value to us, is approximately $75,000 per month.

We must accordingly advise you that we shall hold you liable and responsible for our damages either direct to us or through the owners. We will submit a statement of our damages and claims so soon as the amount is definitely known."

H. Alan Dawson, Burlingham, Veeder, Masten & Fearey, Proctors for Libellants.

[fol. 18] In United States District Court

[Title omitted]

Before Hon. Henry W. Goddard, D. J.

Case

October 31, 1923.

Appearances of Counsel

Burlingham, Veeder, Masten & Fearey, by Mr. Hupper & Mr. Dawson, for the libellants.

Barry, Wainwright, Thacher & Symmers, by Mr. Symmers, for the respondent.

Offers in Evidence

Mr. Hupper: For the libellant, I offer in evidence the charter party between the owners of the vessel and the libellant.

(Received and marked Libellant's Exhibit 1.)

Mr. Hupper: I call for the production of a letter dated August 10, 1917, addressed by the libellant to the Robins Dry Dock.

[fol. 19] ... counsel for the respondent produces the letter.)

Mr. Hopper: I offer this letter in evidence.

(Received and marked Libellant's Exhibit 2.)

The allegations of the first article of the libel are admitted by the respondent with respect to the partnership of the libellant.

The libellant's case is made up of the answer of the respondents, to which I refer, and it will be deemed I take it, that those admissions are in evidence as part of the pleadings.

Mr. Symmers: I think it would save considerable time if the stenographer will take down the reputation of that part of Mr. Hopper's statement which was very clear with reference to the absence of any connection on the part of the agents in making these contracts.

Mr. Hopper: With contracts?

Mr. Symmers: For the docking and the painting and the cleaning of the vessel's bottom and the subsequent contract with reference to installation of the propeller.

Mr. Hopper: The libellants admit that they have nothing to do with making whatever contractual relations there were between the respondent and the ship owners concerning the docking of the vessel and the installation of the propeller.

Mr. Hopper: Libellant rests.

Mr. Symmers: I call for the production of the letter of August 10th.

Mr. Hopper produces the letter.

Mr. Symmers: I offer in evidence a letter dated Philadelphia, August 10, 1917, addressed by the Moore Dock Company to Captain R. Tammen, master of the steamship Hyperion, and signed by owners at New York City.

(Received and marked Respondent's Exhibit A.)

Mr. Hopper: It will appear after that that other was withdrawn, but it is not. It was sent back to us by the master.

Mr. Symmers: I rested as to the burden of an affirmative defense. The allegations in the other articles

"We now understand from you through Messrs Hellieson that the Robins Drydock & Repair Company expect to get the propeller today and to fit it on and have the vessel ready on or about Monday next the 13th instant. This will mean that we will have been kept out of possession of the vessel since about August 1st, and have lost the use of her for approximately two weeks, by reason of the negligence resulting in breaking the propeller which we understand was caused by the Robins people. Our loss for this two weeks period, based upon the market value of the vessel and her value to us, is approximately $7,500, and will of course be increased if there is any further delay.

"We feel that under the facts now before us the Robins Company should pay our claim and we intend to endeavor to collect it from them and purpose to send them a notice to that effect if you have no objections.

"But our Attorneys tell us that under the present law as understood it is doubtful if we can collect direct from Robins as we have no contractual relations with them, and that to protect ourselves we must make claim against you owners for our damages so that you and they may then recover the amount from the Robins people and settle with us. In other words, that we will first collect our damages as well as we can from the Robins people and you owners to make up damages.

"We accordingly have no alternative but to herewith make formal claim upon you owners through you for whatever damages we have suffered or may hereafter suffer by reason of the above detention and loss of use of the vessel.

"We have endeavored to act, however, and herewith request that if the Robins Company is responsible we naturally do not desire to put ourselves to the money, and we will do everything possible to force Robins to pay and will cooperate with you fully to that end. We understand that you already have an affidavit of liability from the Robins people, and we can therefore see no objection to our now making these two claims which we are showing to you, but if you consider it best under the circumstances that we do not send you the claim we shall refrain from doing this and will be glad to receive any suggestion you may care to make."

The Court: So I understand, Mr. Symmers, that a suit had been brought by the charterers against the owners to recover for this loss of time and that the libel had been dismissed?

Mr. Symmers: Yes, sir, but subsequent to the writing of this letter.

The Court: On the ground that the charterers had no claim against the owners?

Mr. Symmers: No, sir, on the ground that owing to the terms of the charter party there was no claim on the part of the libellant against the owners because the owners in the charter party had not agreed when the vessel was withdrawn, that she should be returned to the service of the libellant in a specific period and that the intervening negligence of a third party was not the fault of the owner, and the libel was dismissed. The Circuit Court of Appeals held that they had exercised due diligence and that for Robin's negligence they were not responsible.

Mr. Symmers: I offer on behalf of the respondent, the general release that we took from Captain Rasmussen on settlement with the owners, the release being dated the seventh day of December 1917.

(Received and Marked Respondent's Exhibit B.)

Mr. Hupper: I object to that on the ground that it has no binding force on the libellant.

Respondent rests.

(fol. 23) Mr. Hupper: May I ask you, Mr. Symmers, whether you contend that this release which you put in evidence covers the time chartered in the expression "owners, etc."?

Mr. Symmers: It covers everybody for whom the master as master acted as agent. Whether he was agent for this purpose for your people is a question that I have not gone into very thoroughly. I do not really feel that it has that effect, but I will not admit that it has not that effect.

Mr. Hupper: The question of whether I will call a witness depends on whether you contend that the release may cover the libellant at the time of the charter.

Mr. Symmers: I do not think so because before we executed that release we had notice that you were the charterer. No, I do not think so.

Winge & Co.
CHRISTIANIA
TELEGRAMS: WINGE

Time Charter

GOVERNMENT FORM

Simpson, Spence & Young,
NEW YORK, LONDON,
WEST HARTLEPOOL,
LIVERPOOL AND GLASGOW

Christiania

This Charter Party made and concluded upon in the City of Sweden the thirtenth day of September 1913

Between Messrs. Joh. Ludw. Mowinckel & Son of Bergen owners of the good Steel Screw Steamship "BJØRKEFJORD" of 3680 tons gross register and 2337 tons net register, having engines of 307 nominal horse power and classed with proper certificate for hull and machinery and classed ✠ 100 A 1 at Lloyds of about 326705 cubic feet capacity and about 6180 tons dead weight on thereabouts on Loyds Summer freeboard inclusive of bunkers when are of the capacity of about 517 tons of coal and stores, now trading.-

Steamers speed is about 9 knots on about 20 tons best Welsh.-

and Messrs. Flint Coering & Co. Ltd. Charterers of the City of Philadelphia

Witnesseth: That the said Owners agree to let, and the said Charterers agree to hire the said Steamship from the time of delivery for a period of 5 years

Steamer to be placed at the disposal of the Charterers at a port in U.S. north of Hatteras in such dock or at such wharf or place (where she may always safely lie afloat at all times of tide) as the Charterers may direct, and being on her delivery ready to receive cargo and light, staunch, strong and in every way fitted for the service, having water ballast, steam winches and donkey boiler with capacity to run all the steam winches at one and the same time (and with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage) to be employed in carrying lawful merchandise, including petroleum or its products and passengers as far as accommodation will allow (but any expense necessary to fit the steamer to carry petroleum or its products shall be borne by the owners before the delivery hereof) within the following limits:

to trade between UNITED STATES and MEDITERRANEAN or in such lawful trades as are allowed in owners underwriters policies not south of Bahia Blanca nor East of Singapore, excluding West Indies & Habana oretrades, regular Canadian Coasting, regular European ore trades, regular Hamburg coaltrade, Himanima and all unsafe ports.-

as the Charterers or their Agents shall direct, on the following conditions:

1. That the Owner shall provide and pay for all provisions, wages and consular shipping and discharging fees of the Captain, Officers, Engineers, Firemen and Crew, shall pay for the insurance of the vessel, also for all the cabin, deck, engine room and other necessary stores, and maintain her in a thoroughly efficient state in hull, machinery and gear for the service.

2. That the Charterers shall provide and pay for all the Coal, Cocoa, Water, Port Charges, Pilotages, Agencies, Commissions, Consular Charges, except those pertaining to the Captain, Officers or Crew, and all other Charges whatsoever, except those before stated. Charterers are to provide necessary dunnage and shifting boards, but Owners to allow them the use of the dunnage and shifting boards already aboard Steamer.

3. That the Charterers shall accept and pay for all Coal in the Steamer's Bunkers, and the Owners shall, on the expiration of this Charter Party, pay for all Coal left in the Bunkers, at the current market price at the respective Ports where she is delivered to them.

4. That the Charterers shall pay for the use and hire of the said Vessel £ 1200-say- twelve hundred pounds British Sterling per Calendar Month, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a month; hire to continue until her delivery in like good order and condition, to the Owners (unless lost) at a port in U.S. north of Hatteras

5. That should the Steamer be on her voyage towards the port of redelivery at the time a payment of hire becomes due, said payment shall be made for such a length of time as reasonably or they, Agents and Charterers, or their agents, may agree upon as the estimated time necessary to complete the voyage, and when the steamer is delivered to owners, agents any difference shall be refunded by Steamer or paid by Charterers, as the case may be.

6. Payment of the said hire to be made in cash by Messrs. Samuel Montagu & Co. London in the current United States gold coin, or in approved bankers sight bills on London, at Owners option, monthly, in advance, on the day on which the same becomes due; and in default of such payment the Owners shall have the option of withdrawing the said Steamer from the service of the Charterers, without prejudice to any claim they (the Owners) may otherwise have on the Charterers, in pursuance of this Charter.

7. That the cargo or cargoes to be laden and/or discharged in any dock or at any wharf or place that the Charterers or their Agents may direct, provided the Steamer can always safely lie afloat at any time of tide.

8. That the whole reach of the Vessel's Holds, Decks, and usual places of loading and accommodation of the Ship (not more than she can reasonably stow and carry), shall be at the Charterers disposal, reserving only proper and sufficient space for Ship's officers, crew, tackle, apparel, furniture provisions, stores and fuel.

9. That the Captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance with Ship's crew and boats. The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment, agency, or other arrangements, and the Charterers hereby agree to indemnify the Owners from all consequences or liabilities that may arise from the Captain signing Bills of Lading or otherwise complying with the same.

10. That if the Charterers shall have reason to be dissatisfied with the conduct of the Captain, Officers, or Engineers, the Owners shall, on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointments.

11. That the Charterers shall have permission to appoint a Supercargo, who shall accompany the steamer and see that voyages are prosecuted with the utmost dispatch. He to be furnished, free of charge, with first-class accommodation, and same fare as provided for Captains table.

12. That the Master shall be furnished from time to time with all requisite instructions and sailing directions, and shall keep a full and correct Log of the voyage or voyages, which are to be patent to the Charterers or Agents.

13. That the Master shall use all diligence in caring for the ventilation of the cargo.

14. [illegible]

Philadelphia and Charterers through their

Reserve The Fourth Street National Bank of

16. That if required by Charterers time not to commence before 1st December 1913 and should Steamer not be ready for delivery on or before 1st February 1914 Charterers or their Agents to have the option of cancelling this Charter at any time not later than the day of Steamer's readiness.

17. That in the event of loss of time from deficiency of men or stores breakdown of machinery stranding or damage preventing the working of the Vessel for more than twenty four consecutive hours the payment of hire shall cease until she be again in an efficient state to resume her service but should the Vessel be driven into port or to anchorage by stress of weather or from any accident to cargo such detentions or loss of time shall be at the Charterers risk and expense.

18. That should the Vessel be lost freight paid in advance and not earned (showing from the date of her loss) shall be returned Sheffield Chamberpre. The act of God enemies fire restraint of Princes Rulers and People and all dangers and accidents of the Seas Rivers Machinery Boilers and Steam navigation and Errors of Navigation throughout this Charter Party always mutually excepted

19. That should any dispute arise between the Owners and the Charterers the matter in dispute shall be referred to three persons at New York one to be appointed by each of the parties hereto and the third by the two so chosen their decision or that of any two of them shall be final and for the purpose of enforcing any award this agreement may be made a rule of the court

20. That the Owners shall have a lien upon all cargoes and all sub freights for any amounts due under this Charter and the Charterers to have a lien on the Ship for all moneys paid in advance and not earned

21. That all derelicts and salvage shall be for Owners and Charterers equal benefit (owners average if any to be according to York Antwerp Rules 1890)

22. [redacted]

23. That as the Steamer may be from time to time employed in tropical waters during the terms of this Charter Steamer is to be docked bottom cleaned and painted whenever Charterers and Master think necessary at least once in every six months and payment of the hire to be suspended until she is again in proper state for the service

24. That the Owners are to provide ropes falls slings and blocks sufficient to handle ordinary cargo up to three tons (of 2240 lbs each) but Charterers are to be responsible for all damage to same caused by overloading

25. Steamer to work night and day if required by Charterers and all steam winches to be at Charterers disposal during loading and discharging and Steamer to provide [redacted] if same required. Charterers agreeing to pay extra expenses if any incurred by reason of night work at the current local rate

26. It is also mutually agreed that this Charter is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States approved on the 13th day of February 1893 and entitled "An Act relating to Navigation of Vessels etc"

27. Two and one half per cent upon the hire earned under this Charter payable to the Steamship and Owners due to Messrs. Flint & Co. upon the signing hereof. Steamship owners reserve and also upon any continuation or extension of this Charter to be paid

28. An address commission of 2½ per cent payable to Messrs. Flint Goering & Co. Ltd.

29. Penalty for non performance of this Contract estimated amount of damages

29. Failing payment of hire by charterers to their bankers on the day it falls due, owners to have the right of declaring this contract to be null and void and to withdraw steamer without any notice or protest and without interference of any court or any other formality whatsoever.-

30. Owners to be at liberty to pass survey once during the currency of this charter at a time and place convenient to them, steamer being redelivered to charterers at the port where delivery for passing survey was taken or as may be mutually agreed.- Survey is due November 1915.

31. Steamer is expected to drydock in September or October 1913 and if drydocked then steamer is not to drydock till earliest six months after same.-

32. Charterers have to deposit £ 3000 three thousand pounds Br. Stg. in cash with Messrs. Samuel Montagu & Co. London, or charterers arrange with Messrs. Montagu to give their bank guarantee for this amount-payable to owners immediately if hire not paid by charterers to their bankers as it falls due or if otherwise charter broken by charterers.-

33. Should Captain require funds at any United States port, charterers or their agents to advance same, subject to a commission of 2½ per cent-or at any foreign port, not exceeding £ 100 at each port, subject to a commission of 4 percent such advances to be deducted from next hire money.-

34. Charterers to have the liberty of subletting the steamer, if required by them, they remaining responsible for the due fulfilment of charter.-

35. Steamer not to be rechartered to Messrs. Tweedie Trading Co. of New York.

36. If the owners shall have exercised due diligence to make the steamer in all respects seaworthy and to have her properly manned equipped and supplied, it is hereby agreed that in case of danger, damage, disaster, resulting from faults or errors in navigation, or in the management of the steamer, or from any latent defect in the steamer, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent defect or the unseaworthiness was not discoverable by the exercise of due diligence) the consignees or owners of the cargo shall, nevertheless, pay salvage, and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in General Average to the payment of the sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit, or

...relating to Navigation of Vessels, etc."

...Flint & Co. ... Five per cent. upon the hire earned under ... payable by the Steamship and Owners due in this Charter or on sale of Vessel ... upon the signing hereof. ... and also upon any continuation or extension of this Charter or on sale of Vessel.

* An address commission of 5% per cent payable to Messrs. Flint Goering & Co.Ltd.
** Penalty for non-performance of this Contract, estimated amount of damages.

29. Failing payment of hire by charterers to their bankers on the day it falls due, owners to have the right of declaring this contract to be null and void and to withdraw steamer without any notice or protest and without interference of any court or any other formality whatsoever.-

30. Owners to be at liberty to pass survey once during the currency of this charter at a time and place convenient to them, steamer being redelivered to charterers at the port where delivery for passing survey was taken or as may be mutually agreed.- Survey is due November 1915.

31. Steamer is expected to drydock in September or October 1913 and if drydocked then steamer is not to drydock till earliest six months after same.-

32. Charterers have to deposit £ 3000 three thousand pounds Br.Stg. in cash with Messrs. Samuel Montagu & Co. London, or charterers arrange with Messrs. Montagu to give their bank guarantee for this amount-payable to owners immediately if hire not paid by charterers to their bankers as it falls due or if otherwise charter broken by charterers.-

33. Should Captain require funds at Any United States port, charterers or their agents to advance same, subject to a commission of 2½ per cent-or at any foreign port, not exceeding £ 100 at each port, subject to a commission of 5 percent such advances to be deducted from next hire money.-

34. Charterers to have the liberty of subletting the steamer, if required by them, they remaining responsible for the due fulfilment of charter.-

35. Steamer not to be rechartered to Messrs. Tweedie Trading Co. of New York.

36. If the owners shall have exercised due diligence to make the steamer in all respects seaworthy and to have her properly manned equipped and supplied, it is hereby agreed that in case of danger, damage, disaster, resulting from faults or errors in navigation, or in the management of the steamer, or from any latent defect in the steamer, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent defect or the unseaworthiness was not discoverable by the exercise of due diligence) the consignees or owners of the cargo shall, nevertheless, pay salvage, and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in General Average to the payment of the sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit, or to relieve the adventure from any common peril, all with the same force and effect, and to the same extent, as if such danger damage or disaster had not resulted from, or been occasioned by faults or errors in navigation, or in the management of the vessel, or any latent defect or unseaworthiness.-

37. If Underwriters after average condemn steamer, Charter to be null and void.

Witness to Signatures:

(sd)V.M.Kaufman -

Flint Goering & Co.Ltd.
(sd)George Flint Chairman
(sd)Oscar Goering Secretary & Treasurer

(sd)Joh.Ludw.Mowinckel & Sön

Bergen 15 October 1913.

A true Copy

Libellant's Exhibit No 1

25 - 26

Mr. Hupper: Then I understand that the respondent will not contend that the release covers the time charterers claim, that is to say, the respondent did not pretend to be settling that claim.

Mr. Symmers: I do not know what the respondent thought. We may have thought one thing and the respondent thought another. The respondent paid certain money and got a release from the master which would ordinarily bind everybody and that is what he did.

Mr. Hupper: May we have time enough to get a witness up here?

The Court: Yes.

Mr. Symmers: What is he to testify to?

[fol. 24] Mr. Hupper: It is the man who handled the settlement on the part of the owners with Robins and his testimony will be that he did not place the time charterers claim before Robins and that the claim did not include any claim of the time charterer.

Mr. Symmers: As far as Robins is concerned there was no claim, he did not know of your claim at that time.

Mr. Hupper: Captain Jullum will testify that he was acting for the owners and made a settlement of their claim with Robins and that in making such settlement he did not put forward the claim of the time charterers and did not pretend to be settling that claim.

Mr. Symmers: Have you talked with him?

Mr. Hupper: Yes, Mr. Dawson has.

Mr. Symmers: Your honor may give it all the effect that the sworn testimony would have.

Mr. Hupper: We have that in writing from Captain Jullum.

Mr. Symmers: That is quite satisfactory.

Both sides rest.

Counsel sum up.

Briefs to be submitted by November 11th.

(Here follows Libellants' Exhibit No. 1, marked side folio pages 25 and 26)

[fol. 27] Libelants' Exhibit No. 2

(Letterhead of Flint, Gocring & Co., Ltd.)

Philadelphia, August 10th 1917.

Robins Dry Dock & Repair Co., Brooklyn, New York.

Dear Sirs: Continuing our previous advices to you we are the true chartered owners of the Norwegian Steamship "Bjornefjord," and have been kept out of the possession and will lose the use of the ship by reason of the breaking of her propeller on or about August 1st while you were making repairs to her, due, we are informed, to your negligence. In consequence the use of the vessel will be detained at your yard for a considerable period.

Our loss through this detention, based upon the market value of the ship, and her value to us, is approximately $75,000 per month.

We must accordingly advise you that we shall hold you liable and responsible for our damages either direct to us or through the owners. We will submit a statement of our damages and claims as soon as the amount is definitely known.

Yours very truly, Flint, Gocring & Co., Ltd. T. J. Bass, Asst. Manager.

[fol. 28] Respondent's Exhibit A

(Letterhead of Flint, Gocring & Co., Ltd.)

Philadelphia, August 10, 1917.

Captain R. Rasmussen, master of S. S. "Bjornefjord" and agent of owners, New York City.

S. S. "Bjornefjord" Detention resulting from breaking of propeller during repairs.

Dear Sir: We now understand from you through Messrs. Hellesen that the Robins Drydock & Repair Company of just to get the propeller to-day and to set it on and have the vessel ready on or about Monday next the 13th instant.

This will mean that we will have been kept out of possession of the vessel since about August 1st, and have lost the use of her for approximately two weeks, by reason of the negligence resulting in breaking the propeller which we understand was caused by the Robins people. Our loss for this two weeks period, based upon the market value of the vessel and her value to us, is approximately $37,500, and will of course be increased if there is any further delay.

We feel that under the facts now before us the Robins Company should pay our claim and we intend to endeavor to collect it from them and propose to send them a notice to that effect if you have no objections.

[fol. 29] But our Attorneys tell us that under the peculiar circumstances it is doubtful if we can collect direct from Robins as we have no contractual relations with them, and that to protect ourselves we must make claim against your owners for our damages so that you and they may then recover the amount from the Robins people and settle with us. In other words that you and your owners should collect our damages as well as yours from the Robins people and pay over to us our damages.

We accordingly have no alternative but to herewith make formal claim upon your owners through you for whatever damages we have suffered or may hereafter suffer by reason of the above detention and loss of use of the vessel.

We have explained to you, however, and herewith repeat, that if the Robins Company is responsible we naturally do not desire your owners to lose this money, and we will do everything possible to force Robins to pay and will cooperate with you fully to this end. We understand that you already have an admission of liability from the Robins people and we can therefore see no objection to our now sending them the letter which we are showing to you, but if you consider it bad policy or unfair for any other reason that we do not send it at this time, we shall refrain from doing so and will otherwise act upon any suggestion you may have to make.

Yours very truly, Flint, Goering & Co. Ltd. T. J. Bass, Ass't Manager.

RELEASE.—EXHIBIT B

[fol. 20] To all to whom these presents shall come or may concern, Greeting:

Know ye, that I, Rasmus Rasmussen, as Master of the Norwegian S. S. "Bjornefjord" for and in consideration of the sum of Three Thousand two hundred and seventy one 21 100 dollars ($3,271.21 100), lawful money of the United States of America to me in hand paid by The Robins Dry Dock & Repair Company, a corporation, the receipt whereof is hereby acknowledged, have remised, released, and forever discharged, and by these presents do for said steamship, her owners &c., and myself, my heirs, executors and administrators, remise, release and forever discharge the said Robins Dry Dock & Repair Company, its servants, agents, successors and assigns of and from all, and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law or in equity, which against said Robins Dry Dock & Repair Company, I, as master or otherwise, and the owners &c., of said S. S. "Bjornefjord" ever had, now have or which they or I, my successors, assigns, heirs, executors or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the [fol. 21] day of the date of these presents, and especially of and from all claims and demands arising out of towage and for detention of said steamship which may due to the breaking of propeller on said vessel on or about July 21, 1917.

In witness whereof I have hereunto set my hand and seal the seventh day of December in the year one thousand nine hundred and seventeen.

R. Rasmussen, as Master

Sealed and delivered in the presence of [illegible]

State of New York,
County of Kings, ss:

On this 7th day of December, 1917, before me personally appeared Rasmus Rasmussen, as Master of the Steamship

"Bjornefjord," to me known, and known to me to be the same person described in and who executed the within instrument and he duly acknowledged to me that he executed the same, as Master as aforesaid.

William H. Wilson, Jr., Notary Public, Kings County, No. 189. Kings County Register's No. 9656. Certificate filed in New York County, No. 241. New York County Register's No. 9201. Commission expires March 30, 1919. (Seal.)

[fol. 32] In United States District Court

In Admiralty

[Title omitted]

Opinion

Goddard, District Judge:

The libel alleges and the answer admits that the steamship Bjornefjord, of which the libellants were the time [fol. 33] charterers, was delivered to the respondent for dry docking; that during the course of the work, the respondent was guilty of negligence in connection with the repairs, and as a result of this, the vessel was detained in respondent's dry dock 14 days beyond the time she should have resumed service.

This suit is to recover damages in the sum of $33,069.98 the estimated value of the use of the vessel for the 14 days of which the charterer has been deprived.

The libellants had no contract relations with the respondent, the ship owners having employed the respondent. The charter party, which did not amount to a demise, was entered into between the libellants and owner of the "Bjornefjord" on September 13th, 1913, and included inter alia, the following provisions:

"1. That the owner shall * * * maintain her in a thoroughly efficient state in hull and machinery for and during the service."

"5. * * * in case of loss of time from * * * breakdown of machinery, * * * or damage preventing the work-

ing of the vessel for more than twenty-four consecutive hours, the payment of hire shall cease until she be again in an efficient state to resume her service. * * *

"17. * * * The act of God * * * and all dangers and accidents of * * * machinery * * * throughout this Charter Party, always mutually excepted.

"22. That as the Steamer may be from time to time employed in tropical waters during the terms of this charter, [fol. 34] Steamer is to be docked, bottom cleaned and painted, whenever Charterers and Master think necessary at least once in every six months, and payment of the hire to be suspended until she is again in proper state for the service."

On or about July 29th, 1917, in accordance with article 22 referred to above, the vessel was withdrawn to be docked and to have her bottom cleaned and painted by the Robins Dry Dock & Repair Company, hereinafter called the Robins Company. In the course of this operation, a crack was discovered in the propeller and the owners employed the Robins Company to install another one, and while the workmen of the Robins Company were engaged in the process of installing this new propeller, they negligently permitted it to fall and so damaged it that it was necessary to have a new propeller cast. This casting of the new propeller caused a delay of 14 days in the return of the vessel to the use of the charterer. The dry dock was the type termed a "graving" dock, a structure permanently resting on the shore, made by dredging and the building of a coffer dam; after the ship is floated into the dock, the gates are closed and the water pumped out.

One of the defenses to this libel, asserted by the respondent, was that a settlement had been made by the owner of the Bjornefjord, and a release taken covering the damage accruing to the owner by reason of the steamer being delayed as a result of the respondent's negligence. This release did not purport to cover any claim that the libellants, [fol. 35] as the charterers, might have. On the contrary, the respondent took the position that the libellants never had any claim. In a letter of August 10th, 1917, the respondent was advised that the libellants were time charterers of the vessel "and that they made claim for the detention caused by the respondent's negligence at the rate

of $75,000 per month. The settlement with the owners pleaded by the respondent was made about December 7th, 1917, and was for admitted negligence on the part of the Robins Company. The respondent has admitted that it was liable to the owner for the owner's damages during the detention which, of course, was measured chiefly by the charter hire which the owner lost during the two weeks detention period; this was a comparatively small amount as the steamer had been chartered in 1913 when rates were low. Nevertheless, the owner's damages were limited by the amount he would have received for the vessel had she not been detained. If the owner had not bound the vessel to the libellants by the charter of September 13th, it could undoubtedly have collected from the respondent the full market value of the steamer for the detention period. The question then is: Has the respondent been absolved from the substantial balance of damages simply because the vessel is under charter, and is the time charterer wholly without remedy for the substantial loss which the respondent's negligence has caused them? The respondent asserts that the time charterer has no relief whatsoever in the premises, no matter how long the delay or how heavy the damage.

(2d 26). In the Aquitania, 270 Fed. 239, Circuit Judge Mayer, then of the District Court, held that a time charterer has a property interest in the vessel and may recover damages for a collision in which she is injured, including his damages for loss of use while she is being repaired. The principle involved in the Aquitania case, supra, is practically identical with the one in the case at bar. No cases have been submitted to me, or have I been able to find any leading to a contrary conclusion, and I think I should follow Judge Mayer's reasoning and decision.

In the case of Hines, agent, v. Sangstad S. S. Co., et al., 266 Fed. 502, cited by Judge Mayer in the Aquitania case, supra, the time charterer was allowed to recover from the respondent whose, because of respondent's negligence, a vessel's mast was damaged.

Is the right to the use of a vessel, a property right which the law recognizes and protects? If a third party, not the owner of the vessel, through negligence, deprives the charterer of this right, has he any remedy? In some instances, the charterer might protect himself in his charter party with the owner. In many instances this would be unsatis-

a charterer through virtue of a charter contract constitutes a lien on the vessel."

The principle involved in the case at bar is distinguishable from the one discussed in Byrd v. English, 117 Ga. 192, cited by the respondent. In Byrd v. English (supra) a party to a contract was damaged by reason of the failure of the other party to comply with its terms, such failure being due to the negligent act of a third person, by which the performance of the contract was rendered impossible. There, the plaintiff had no special property interest in the electric power supply, for the deprivation of the use of which he sued. Moreover, the damages in that case were prospective and remote. In the case at bar, the libellants seek to recover merely as share of the total value of the use of the vessel. Prospective profits or remote damages are not demanded. All that is asked for, is the actual value of the use of the vessel. To arrive at its fair value, it is necessary, in this instance, to consider the interest of the owner and the charterer. The charterer had a right to the use of the vessel, which had a value and could have been [p. 29] disposed of in the open market.

The respondent urges the further point that if the action here be considered to be founded on tort, then in admiralty, the place of tort determines the jurisdiction, that the alleged tort in the case at bar did not occur upon navigable waters, the ship at the time being in dry dock for repairs. However, the following authorities hold to the contrary:

The Jefferson, 215 U. S. 130, 142, 143;
Robert W. Parsons, 191 U. S. 17, 32, 34;
Donaldson v. Morse Dry Dock & Repair Co., 215 N. Y. 429, 442.

In this case it was held that a tort on a dry dock was within the admiralty jurisdiction. Certiorari was denied by the Supreme Court in 43 Sup. Ct. 70.

Anglo Patagonian, 276 Fed. 925. Certiorari denied, 242 U. S. 636.

So the law seems to be settled that the Admiralty Court has jurisdiction over a tort of this nature committed on a ship while the ship is in a dry dock undergoing repairs.

Accordingly, a decree may be entered in favor of the libelants against the respondent, with a reference to a Commissioner to ascertain the damages, unless the damages can be agreed upon.

April 2nd, 1924.

Henry W. Goddard, U. S. D. J.

[fol. 40] In United States District Court

[Title omitted]

Interlocutory Decree

The issues herein having duly come on to be heard on the pleadings and proofs and having been argued by the advocates for the respective parties, and the Court on April 2, 1924, after due deliberation, having rendered its decision granting a decree in favor of the libellants with a reference to a Commissioner to ascertain the damages

[fol. 41] Now, on motion of H. Alan Dawson and Bellingham, Vedder, Masten & Pearce, proctors for libellants, it is

Ordered that the libellants recover from the respondent the damages by them sustained by reason of the matters set forth in the libel, with interest and costs; and it is further

Ordered that it be referred to Mark W. Mackey, Jr., Esq., as Commissioner to determine said damages and report the same to this Court with all convenient speed.

Henry W. Goddard, U. S. D. J.

Notice of settlement waived. Barry, Wainwright, Thacher & Symmers, Proctors for Respondent.

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPORT OF MARK W. MACLAY, SPECIAL COMMISSIONER

To the Judges of the United States District Court for the Southern District of New York:

I, Mark W. Maclay, Special Commissioner, do hereby report as follows:

On June 16, 1924, an interlocutory decree was entered herein, decreeing that the libelants recover from the respondent the damages sustained by reason of the matters set forth in the libel with interest and costs, and ordering that it be referred to me as Special Commissioner to determine the libelants' damages and report the same to this court with all convenient speed.

[fol. 43] On October 20, 1924, and various subsequent dates, I was attended by Burlingham, Veeder, Masten & Fearey (Roscoe H. Hupper, Esq. and W. J. Dean, Esq., Advocates) proctors for libelants and by Barry, Wainwright, Thacher & Symmers (J. C. Crawley, Esq., Advocate), proctors for the respondent, who presented testimony consisting of thirty-eight pages and twelve exhibits marked Libelants' Exhibits 1 to 6 inclusive and Respondents' Exhibits A to F inclusive, all filed herewith.

Having considered the evidence and the arguments and briefs of counsel thereon, I hereby further report as follows:

By the negligence of the respondent in connection with repairs to the SS. Bjornefjord, ordered by her owners, the vessel was detained in respondent's dry dock fourteen days beyond the time when she should have resumed service. It is not disputed that the detention of fourteen days began on August 1, 1917, and ended at 3 p. m., August 15, 1917. The decision of the court holds that the libelants, time charterers of the Bjornefjord, had a property right in the vessel of which they were deprived by the negligence of the respondent and are entitled to recover for the deprivation of the right to the use of the vessel which had

a value and could have been disposed of in the open market."

The Bjornefjord, 1925 A. M. C. 740, 745.

Three charters of the SS. Bjornefjord were offered in evidence, one by the owners to the libelants and the two [fol. 44] others by the libelants to separate subcharterers. All three of these charters are on substantially similar time forms containing similar breakdown and address commission clauses, so that nothing turns on the differences in the general terms of these charters, but only on the times and rates provided for.

The owner of the vessel, Joh. Ludw. Mowinkel, by charter party dated September 13, 1913, Libelants' Exhibit 6, chartered the Bjornefjord to Flint Goering & Co., Ltd. for five years for a hire of £1,200 per calendar month, payment to be made in cash at current short sight rate of exchange or in approved Banker's sight bills on London at owner's option, monthly in advance. On account of increased expenses due to the war, the libelants obligated themselves to pay in August, 1917, £250 per month in addition to the charter hire. Libelants' Exhibit 6. The period of this charter extended well beyond the detention which is the subject matter of this reference.

The libelants, charterers of the vessel under Libelants' Exhibit 5, chartered her for twelve months by charter party dated April 25, 1916, to Howard Houlder & Partners, Ltd. By addenda dated November 30, 1915, and November 6, 1916, the period of this charter was extended to an aggregate of twenty-six or twenty-eight months after the vessel originally came on hire. Respondent's Exhibit F. The hire under the second addendum was at the rate of £11,201 10s per calendar month, payable in cash in British sterling in London monthly in advance.

[fol. 45] It has not been shown definitely when the Bjornefjord was delivered under this charter or when the charter period under the second addendum expired, but it is clear that the Bjornefjord was duly re-delivered by Howard Houlder & Partners, Ltd. to the libelants at New York on July 22, 1917, at 11:30 a. m. Minutes, 38.

While the Bjornefjord was trading under the Houlder charter party, Respondent's Exhibit F, the libelants char-

tered her by charter party dated June 28, 1917, Respondent's Exhibit C, to Norton, Lilly & Co. for £16,295 per calendar month to be paid "in cash monthly in advance in New York at the current rate of exchange for approved Bankers demand bills on London, in U. S. Gold or its equivalent", Clause 6, "from the time of delivery for about sixteen months from expected re-delivery date of present charter, say September 1st until, say, December 27th, 1918, the expiration date of Owners 5 year charter with Flint, Goering & Co., Ltd. * * * * if required by charterers, time not to commence before August 15, 1917.

This charter party also required the charterers to pay owner's war risk insurance premium over 1% monthly on a valuation of two million kroners; but as there is not any evidence of what the owner's war risk insurance premium was and, therefore, no evidence that it was over 1%, this clause is not material to any finding herein.

From the files of Norton, Lilly & Company there were produced and offered in evidence two letters addressed to [fol. 46] Norton, Lilly & Co. by Geo. Hellissen, Inc., each signed by E. B. Searle, Vice President. Grady, 26-28. It is to be inferred from the letters themselves, from Respondent's Exhibit C, and from the testimony of Mr. Grady, that Geo. Hellissen, Inc., were agents for the time chartered owners.

The first letter dated July 7, 1917, Libelants' Exhibit 4, advises Norton, Lilly & Co. that Howard Houlder & Partners, Ltd., charterers under Respondent's Exhibit F, wished to redeliver the vessel about the end of July, and that the libelants, the time chartered owners, were willing to accept re-delivery at that time provided Norton, Lilly & Co. were "agreeable" to accepting delivery of steamer under your time charter, when vessel is ready." Libelants' Exhibit 4.

The second letter dated July 17, 1917, Libelants' Exhibit 5, refers to the charter party of June 28, 1917, Respondent's Exhibit C, and continues:

"This will serve to confirm our verbal understanding with your office to the effect that you are agreeable to taking this steamer when ready at New York, probably the end of July or early August, all other conditions of said charter party remaining in force, except that by this provision the

stipulation of the layday date in said charter is hereby understood to be eliminated."

[fol. 47] The endorsement of this letter, "1 copy to Ring Chartering Board" indicates that the letter was treated by Norton, Lilly & Co. as a modification of the charter party such as should be filed with the chartering board. These two letters were filed with the copy of the charter party. Grady, 36.

Neither the author of these letters nor the member of the firm of Norton & Lilly & Co. who actually carried on the negotiation in question, was called as a witness and the absence of neither was explained. Mr. Grady's recollection of the whole affair at the time he testified, nearly eight years later, was very faint. Grady, 29, 32.

While Libelants' Exhibits 3 and 4 were scarcely proved in accordance with strict common law requirements, there is certainly no reason whatever to question either the genuineness or bona fide character of these letters or that they were in fact sent and received about the time of their respective dates.

Moreover, Mr. Grady, who was the South American freight manager of Norton, Lilly & Co. at the time in question, testified that his firm was ready to receive the vessel whenever she tendered in the summer of 1917. Grady, 31, 33-34, that they had cargo available and were anxious to have the ship, Grady, 34, and that while he did not remember the details of the verbal understanding referred to in Libelants' Exhibit 3, there was not any question in his mind that such an agreement was made. Grady, 27.

[fol. 48] In view of the description in Respondent's Exhibit C of the time of delivery and re-delivery in terms of the expiration of the other charters, Libelants' Exhibit 5 and Respondent's Exhibit F, indicating that the Norton, Lilly & Co. charter was intended to fill out so much of the owner's five year charter as should remain after the expiration of the Howard Houlder & Partners' charter, it is quite likely that these libelants might have compelled Norton, Lilly & Co. to accept delivery of the vessel on August 1st, in the absence of evidence that the charters would have required that time should not commence before August 15, 1917. Whether or not Norton, Lilly & Co. could have been compelled to accept delivery on August 1st, it is reasonably

certain that they would have accepted the vessel had she been tendered on August 1st. The profitable employment of the vessel need not be proved beyond all doubt. It suffices if the libelant shows a state of fact from which a court or jury can find that there was an opportunity to employ the vessel and that the owner would probably have availed himself of it. The North Star, C. C. A. 2nd, 1907, 151 Fed. 168, 175.

The libelants sought to show a market value in excess of the rate of hire of the Norton Lilly & Co. charter, Respondent's Exhibit C. Mr. Richard D. Wrigley, a broker of long experience, placed the market value of the Bjornefjord on a time charter basis about the first half of August, 1917, at from $87,323.40 to $92,700 per calendar month. Wrigley, 4, [fol. 49] and supported his opinion with two charters which were put in evidence. Libelants' Exhibits 1 and 2; Wrigley, 5, 7.

A vessel such as the Bjornefjord could have been fixed on charter very quickly at that time, Wrigley, 16, and indeed Mr. Johnston readily admitted that the Bjornefjord charter, Respondent's Exhibit 6, was "about the market rate for long voyage trade at that time." Johnston, 24.

I find from the expert testimony, therefore, that between August 1 and August 15, 1917, the time charter market for such a vessel as the Bjornefjord was active and considerably higher than the rate at which the vessel was actually chartered to Norton, Lilly & Co. Particularly as the Norton Lilly & Co. charter, Exhibit C, was offered in evidence by the respondent, which is, therefore, bound thereby, the practical result is that the libelants are clearly entitled to have their damages computed at a minimum fixed by that charter.

The libelants contend, however, that under the rule of The Conqueror, 1896, 166 U. S. 110, they are entitled to have their damages computed on the market value of the Bjornefjord, even though that be higher than the amount which they in all probability would have actually obtained for the vessel. The injured party, however, is not entitled to recover for any loss beyond that which he actually sustained. The North Star, C. C. A. 2nd, 1907, 151 Fed. 168, 175. This principle is clearly recognized in the opinion of

[fol. 50] Judge Goddard in this case. The Bjornefjord, 1924 A. M. C. 740, 742.

I find, therefore, that these libelants would have received monthly in advance hire at the rate of £16,995 per calendar month, equivalent to $80,819.72 at the stipulated rate of exchange of $4.7555, Stipulation, p. 37, less an address commission of 2½% due charterers, clause 29, Respondent's Exhibit C, amounting to $2,020.49, or a net hire per month of $78,799.23. As the calendar month had thirty one days, the rate per day was $2,541.91, and as the period of detention was fourteen days, the libelants suffered a gross loss of $35,586.76.

In order to earn this hire, the libelants would have been obliged to pay the owner of the vessel monthly in advance £1,470 per calendar month which, at $4.7555 per pound, is equal to $6,990.47 per calendar month, $222.43 per day, and $3,114.02 for fourteen days. The deduction of the address commission of 2½%, $77.85, due charterers, clause 27, Libelants' Exhibit 5, leaves a net cost of $3,036.17.

As hire was payable monthly in advance under both charters, and as there is no evidence of the precise date when hire for August was actually paid to the owners, there is not any difference in interest dates to be taken into consideration in arriving at the net loss.

I find, therefore, that the libelants suffered damages in the principal sum of $32,550.57.

It remains to consider the question of interest, as to which there is a sharp dispute. The libelants claim interest from [fol. 51] August 1, 1917. The respondent contends that if any event interest should not be allowed for the period between the accrual of the cause of action and July 30, 1920, the date when the libel was filed, and that the delay in filing the libel is a sufficient reason to disallow all interest until the date of ascertainment of liability.

While the record in this reference does not contain any testimony concerning the reason for the delay in bringing suit, proctors for the libelants explained that the real reason was that the libelants, believing their best remedy to be against the owners of the vessel, brought proceedings against them. When their libel was dismissed the present suit was brought. The explanation offered by the proctors for the libelants is supported by the reported decision of

this Circuit Court of Appeals affirming the dismissal of the libel against the owners. The Bjornefjord, C. C. A. 2nd, 1921, 271 Fed. 682.

On the other hand there is not any evidence, or indeed any reason to believe, that the respondent has been prejudiced in any way by the delay; and the respondent ought not to complain of delay caused by the libelants' efforts to recover from someone else, particularly as the result was to permit the respondent to use the money which it is now obliged to pay, for a period, during the greater part of which money was worth considerably more than the legal rate of interest.

[fol. 52] In the present case I do not find any special circumstances for exercising the judicial discretion against the allowance of interest such as existed in The Arpillao, C. C. A. 2nd, 1920, 270 Fed. 426; The James McWilliams, C. C. A. 2nd, 1917, 240 Fed. 951; The Ada, 1916, 239 Fed. 363.

It is well settled that in general, interest on damages for detention as the result of collision runs from the time the vessel is returned to the service of the injured party. In re Great Lakes Dredging & Dock Co., 1917, 250 Fed. 916, 917; C. C. A. 1st, 1919, 256 Fed. 497, 505. The reason for this rule is that in the ordinary case actual payment of the freight or earnings would not have been made until, or after, the return of the vessel to service. In the present case, however, the libelants would have received payment of their hire from Norton, Lilly & Co. on August 1, 1917, because this hire was payable monthly in advance. If the libelants are to be placed as nearly as possible in the position they would have occupied had the tort not been committed, they should be compensated for the loss of use of the money which they would have received from the date on which they would have received it. Accordingly, interest is allowed from August 1, 1917.

The libelant's damages are, therefore, determined as follows:

[fol. 53] Principal	$32,550 57
Interest, August 1, 1917 to September 1, 1925	15,787 03
Total as of September 1, 1925	$48,337 60

New York, August 27, 1925.
Respectfully submitted,
Mark W. Maclay, Special Commissioner.

[fol. 54] Libelants' Exhibit No. 3

(Letter head of Geo. Hellesen, Inc.)

New York, July 17th, 1917.

Messrs. Norton, Lilly & Co., New York City.

S. S. "Bjornefjord"

Dear Sirs: Referring to charter party of this steamer, dated June 28th, 1917, this will serve to confirm our verbal understanding with your office to the effect that you are agreeable to taking this steamer when ready at New York, probably the end of July or early August, all other conditions of said charter party remaining in force, except that by this provision the stipulation of the layday date in said charter is hereby understood to be eliminated.

Yours very truly, Geo. Hellesen, Inc. E. B. Searle, Vice-Pres.

Libelants' Exhibit No. 4

(Letterhead of Geo. Hellesen, Inc.)

New York, July 7th, 1917.

Messrs. Norton Lilly & Company, New York City.

S. S. "Bjornefjord"

Dear Sirs: Time charter owners of this steamer advise us by telephone from Philadelphia this A. M. that they are

Form D 1.11

GEO. HELLIESEN,
Ship & Steamship Broker,
MARITIME BUILDING
5 & 10 BRIDGE STREET,
NEW YORK.
Cable Address—HELLIESEN, N. Y.

CHARLES CLAYDON & CO
3 CROSBY SQUARE
LONDON, E. C.

BAKER & IBSAHL
BERGEN, NORWAY

CODES
PRIVATE CODES
ALSO
WATKINS CODE & APPENDIX

TIME CHARTER PARTY.

Respondentia
at C
2/3/15
M&S

This Charter Party, made and concluded upon in the City of New York, the 28th day of June 1917

between Flint, Goering & Company Ltd, Time chartered Owners of the good Steel Screw Steamship,

BJORNEFJORD of Bergen of 3680 tons gross register, and 2337 tons net register having engines of 307 nominal horse power, provided with proper certificate for hull and machinery, and classed about 6180 tons total deadweight on Lloyds Summer freeboard. 100 A.1. at Lloyds and Norton, Lilly & Company Charterers of the City of New York

Witnesseth, That the said owners agree to let, and the said charterers agree to hire the said steamship from the time of delivery, for about sixteen months from expected redelivery date of present charter, say September 1st, until say Dec. 29th. 1918, the expiration date of Owners 2 year charter with Flint Goering & Co. Ltd.

Steamer to be placed at the disposal of the Charterers, at New York

in such dock or at such wharf or place (where she may always safely lie afloat, at all times of tide), as the Charterers may direct, and being, on her delivery ready to receive cargo, and tight, staunch, strong and in every way fitted for the service, including dunnage as may be on board, having water ballast, steam winches and donkey boiler (and with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage), and to be so maintained during the continuation of this Charter Party, to be employed in carrying lawful merchandise ~~live stock only, and on deck~~ including petroleum or its products, ~~and passengers on the customary conditions~~ in such lawful trades, between safe ports within the following limits:

To trade exclusively between United States, East Coast, including U.S.Ports in Gulf of Mexico, and South America (East coast) not south of Bahia Blanca, including all ports in West Indies but excluding West Indies ore trade and Nima Nima. All unsafe ports to be excluded in the above trading limits.

as the Charterers or their Agents shall direct, on the following conditions:

1. That the owners shall provide and pay for all provisions, wages and Consular shipping and discharging fees of the Captain, Officers, Engineers, Firemen and Crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engine room and other necessary stores, and maintain her in a thoroughly efficient state, in hull and machinery for and during the service.

2. That the Charterers shall provide and pay for all the Coals, Fuel, Port Charges, Pilotages, Agencies, Commissions, Consular Charges (except those pertaining to the Captain, Officers and Crew), and all other charges whatsoever except those before stated. including Galley coal

3. That the Charterers shall accept and pay at once on delivery of Steamer for all Coal in the Steamer's Bunkers on delivery, and the Owners shall, on expiration of this Charter Party, pay for all Coal left in the Bunkers, each at the current market prices at the respective Ports where she is delivered to them.

4. That the Charterers shall pay for the use and hire of said Vessel Sixteen thousand, nine hundred and ninetyfive Pounds------ British Sterling £16.995 per Calendar Month, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a month; hire to continue until her delivery, with clean holds to the Owners (unless lost) at at a United States Atlantic port north of Cape Hatteras

5. That should the Steamer be on her voyage towards port of return delivery at the time a payment of hire becomes due, said payment shall be made for such a length of time, as the Owners or their Agents and Charterers, or their Agents may agree upon as the estimated time necessary to complete the voyage, and when the Steamer is delivered to Owners' agents any difference shall be refunded by steamer or paid by Charterers, as the case may require.

6. Payment of the said hire to be made in cash monthly in advance in New York at the current rate of exchange for approved Bankers demand bills on London, in U.S.Gold or its equivalent.

and in default of such payment or payments as herein specified, the Owners shall have the faculty of withdrawing the said steamer from the service of the Charterers, without prejudice to any claim, they, the Owners, may otherwise have on the Charterers, in pursuance of this Charter.

7. ~~The owners to rent U.S. Passenger Inspectors to be borne by Charterers. Charterers to pay in embarking passengers at the rate of 9/8d. Sterling per day for first class passengers, 6/8d for second class passengers and 3/4 for laborers or steerage passengers.~~

8. The cargo or cargoes to be laden and/or discharged in any dock, or at any wharf or place that the Charterers or their agents may direct, provided the steamer can always safely lie afloat at any time of tide.

9. That the whole reach of the vessel's holds, deck and usual places of loading, and accommodation of the ship (not more than she can reasonably stow and carry) shall be at the Charterers' disposal, reserving only proper and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions, stores and fuel.

10. That the Captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance with ship's crew, tackle and boats. That the Captain (although appointed by the Owners), shall be under the orders and direction of the Charterers as regards employment, agency or other arrangements, and the Charterers hereby agree to indemnify the Owners from all consequences or liabilities that may arise from the Captain signing Bills of Lading, or otherwise complying with the same.

11. That if the Charterers shall have reason to be dissatisfied with the conduct of the Captain, Officers or Engineers, the Owners shall on receiving particulars of the complaint, investigate the same, and if necessary, make a change in the appointments.

12. That the Charterers shall have permission to appoint a super-cargo who shall accompany the steamer and see that voyages are prosecuted with the utmost dispatch. He is to be furnished, free of charge, with first-class accommodations, and same fare as provided for Captain's table.

13. That the Master shall be furnished, from time to time, with all requisite instructions and sailing directions, and shall keep a full and correct Log of the voyage or voyages which are to be patent to Charterers or their Agents, and to furnish the Charterers, their Agent or Super-cargo, when required, a true daily copy of Log, showing the course of the steamer and distance run, and the consumption of Coal and to take every advantage of Wind by using the Sails with a view to economize the expenditure of Coal.

14. That the Master shall use all diligence in caring for the ventilation of the cargo.

15. That in the event of the loss of time from deficiency of men or stores, breakdown of machinery, stranding, fire or damage preventing the working of the vessel for more than twenty-four running hours, the payment of the hire shall cease until she be again in an efficient state to resume her service; but should she in consequence put in to any port, other than that to which she is bound, the Port Charges and Pilotages at such Port shall be borne by the Steamer's Owners, but should the vessel be driven into Port, or to anchorage by stress of weather, or from any accident to the cargo, such detention or loss of time shall be at the Charterer's risk and expense.

16. That should the vessel be lost, freight paid in advance not earned (reckoning from the date of her last being heard of) shall be returned to the Charterers.

17. The act of God, enemies, fire, restraint of princes, rulers and people and all dangers and accidents of the seas, rivers, machinery, boilers and steam navigation, and errors of navigation, throughout this Charter Party, always mutually excepted.

18. That should any dispute arise between the Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision, or that of any two of them shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of Court.

19. That the Owners shall have a lien upon all cargoes, and all sub-freights, for any amounts due under this Charter, and the Charterers to have a lien on the Ship, for all moneys paid in advance and not earned.

20. ~~That the Charterers have the option, at any time during this Charter, of purchasing the said vessel for the sum of~~ Charterers to pay Owners war risk insurance premium over 1% monthly on a valuation of Two Million Kroners

21. That as the steamer may be from time to time employed in tropical waters during the term of this Charter, steamer is to be docked, bottom cleaned and painted whenever Charterers and Master think necessary, but at least once in every six months, and payment of the hire to be suspended until she is again in proper state for service.

22. That the Owners are to provide ropes, falls, slings and blocks, necessary to handle ordinary cargo up to three tons (of 2240 lbs. each) in weight, also lanterns for night work.

23. Steamer to work night and day, if required by Charterers, and all steam winches to be at Charterer's disposal during loading and discharging, and steamer to provide ~~[illegible]~~ men if required, ~~while~~ both day and night as required, Charterers agreeing to pay extra expense if any incurred by reason of night work, at the current local rate. (after deducting crew's portion and expenses)

24. That all derelicts and salvage shall be for Owners' and Charterers' equal benefit. General average, if any, to be according to York-Antwerp Rules 1890.

25. ~~That the Charterers shall have the option of continuing this Charter for a further period of~~ Charterers to provide necessary dunnage and shifting boards, but owners to allow them use of dunnage and shifting boards on steamer. Ship not responsible for damage or shortage of cargo.

~~on giving notice thereof to the Owners or their Agents~~ days previous to the expiration of the first-named term, or any declared option.

26. Charterers to have the liberty of subletting the steamer, if required by them, but charterers remain responsible for fulfilment of this Charter.

27. That if required by Charterers, time not to commence before August 15th. 1917 and should steamer not be ready for delivery at port of delivery on or before September 15th. 1917 Charterers or their Agents to have the option of cancelling party this Charter, at any time not later than the day of steamer's readiness.

28. It is also mutually agreed, that this Charter is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled "An Act relating to Navigation of Vessels, etc."

29. ~~A freight brokerage of~~ All address commission of 2½ per cent. is due to Norton, Lilly & Co. as freight carrier and a commission of ~~five~~ per cent. on the estimated amount of Freight, is due and payable by Owners, on signment hereof to GEO. HELLIESEN, Ship lost or not lost, ~~and on any extension or renewal of this Charter or purchase of vessel.~~

30. Penalty for non-performance of this Contract, estimated amount of damages.

Steamer not to be re-chartered to Tweedie Trading Company

FLINT, GOERING & CO. Ltd.
(sgd) George Flint
Chairman

(sgd) T.J.Baus

Witness to the signature of

~~By cable authority from~~

dated 191

(sgd) NORTON, LILLY & COMPANY

I HEREBY CERTIFY the above to be a true copy of the original Charter Party in my possession. GEO HELLIESEN INC

the Captain subject to a commission of 2½, such advances to be deducted from the next hire.

I Hereby Certify the above to be a true copy of the original Charter Party in my possession. GEO HELLIESEN

winches and donkey boiler, (and with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage), and to be so maintained during the continuation of this Charter Party, to be employed in carrying lawful merchandise, ~~live stock under and/or on deck~~ including petroleum or its products, ~~and passengers so far as steamer's license will allow~~ in such lawful trades, between safe ports within the following limits:

To trade exclusively between United States, East Coast, including U.S.Ports in Gulf of Mexico, and South America (East coast) not south of Bahia Blanca, including all ports in West Indies but excluding West Indies ore trade and Nima Nima. All unsafe ports to be excluded in the above trading limits.

as the Charterers or their Agents shall direct, on the following conditions:

1. That the owners shall provide and pay for all provisions, wages and Consular shipping and discharging fees of the Captain, Officers, Engineers, Firemen and Crew, shall pay for the insurance of the vessel, also for all the cabin, deck, engine room and other necessary stores, and maintain her in a thoroughly efficient state, in hull and machinery for and during the service. **including Galley coal**

2. That the Charterers shall provide and pay for all the Coals, Fuel, Port Charges, Pilotages, Agencies, Commissions, Consular Charges (except those pertaining to the Captain, Officers and Crew), and all other charges whatsoever except those before stated.

3. That the Charterers shall accept and pay at once on delivery of Steamer for all Coal in the Steamer's Bunkers on delivery, and the Owners shall, on expiration of this Charter Party, pay for all Coal left in the Bunkers, each at the current market prices at the respective Ports where she is delivered to them.

4. That the Charterers shall pay for the use and hire of said Vessel **Sixteen thousand, nine hundred and ninetyfive**

Pounds------ British Sterling **£16.995** per Calendar Month, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a month, hire to continue until her delivery, with clean holds to the Owners (unless lost) at **at a United States Atlantic port north of Cape Hatteras**

5. That should the Steamer be on her voyage towards port of return delivery at the time a payment of hire becomes due, said payment shall be made for such a length of time, as the Owners or their Agents and Charterers, or their Agents may agree upon as the estimated time necessary to complete the voyage, and when the Steamer is delivered to Owners' agents any difference shall be refunded by steamer or paid by Charterers, as the case may require.

6. Payment of the said hire to be made in cash **monthly** in advance in New York at the ~~same~~ **current rate of exchange for approved Bankers demand bills on London, in U.S.Gold or its equivalent.**

and in default of such payment or payments as herein specified, the Owners shall have the faculty of withdrawing the said steamer from the service of the Charterers, without prejudice to any claim, they, the Owners, may otherwise have on the Charterers, in pursuance of this Charter.

7. ~~Owners consent to use U.S. Passenger Inspectors to be borne by Charterers. Charterers to pay for outcoming passengers at the rate of 5/8d. Sterling per day for first class passengers, 3/4 for second class passengers and 1/2 for laborers or steerage passengers.~~

8. The cargo or cargoes to be laden and/or discharged in any dock, or at any wharf or place that the Charterers or their agents may direct, provided the steamer can always safely lie afloat at any time of tide.

9. That the whole reach of the vessel's holds, deck and usual places of loading, and accommodation of the ship (not more than she can reasonably stow and carry) shall be at the Charterers' disposal, reserving only proper and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions, stores and fuel.

10. That the Captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance with ship's crew, tackle and boats. That the Captain (although appointed by the Owners), shall be under the orders and direction of the Charterers as regards employment, agency or other arrangements, and the Charterers hereby agree to indemnify the Owners from all consequences or liabilities that may arise from the Captain signing Bills of Lading, or otherwise complying with the same.

11. That if the Charterers shall have reason to be dissatisfied with the conduct of the Captain, Officers or Engineers, the Owners shall on receiving particulars of the complaint, investigate the same, and if necessary, make a change in the appointments.

12. That the Charterers shall have permission to appoint a super-cargo who shall accompany the steamer and see that voyages are prosecuted with the utmost dispatch. He is to be furnished, free of charge, with first-class accommodations, and same fare as provided for Captain's table.

13. That the Master shall be furnished, from time to time, with all requisite instructions and sailing directions, and shall keep a full and correct Log of the voyage or voyages which are to be patent to Charterers or their Agents, and to furnish the Charterers, their Agent or Super-cargo, when required, a true daily copy of Log, showing the course of the steamer and distance run, and the consumption of Coal and to take every advantage of Wind by using the Sails with a view to economize the expenditure of Coal.

14. That the Master shall use all diligence in caring for the ventilation of the cargo.

15. That in the event of the loss of time from deficiency of men or stores, breakdown of machinery, stranding, fire or damage preventing the working of the vessel for more than twenty four running hours, the payment of the hire shall cease until she be again in an efficient state to resume her service; but should she in consequence put in to any port, other than that to which she is bound, the Port Charges and Pilotages at such Port shall be borne by the Steamer's Owners, but should the vessel be driven into Port, or to anchorage by stress of weather, or from any accident to the cargo, such detention or loss of time shall be at the Charterer's risk and expense.

16. That should the vessel be lost, freight paid in advance not earned (reckoning from the date of her last being heard of) shall be returned to the Charterers.

17. The act of God, enemies, fire, restraint of princes, rulers and people and all dangers and accidents of the seas, rivers, machinery, boilers and steam navigation, and errors of navigation, throughout this Charter Party, always mutually excepted.

18. That should any dispute arise between the Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision, or that of any two of them shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of Court.

19. That the Owners shall have a lien upon all cargoes, and all sub-freights, for any amounts due under this Charter, and the Charterers to have a lien on the Ship, for all moneys paid in advance and not earned.

20. ~~That the Charterers have the option, at any time during the Charter, of purchasing the said vessel for the sum of~~ **Charterers to pay Owners war risk insurance premium over 1% monthly on a valuation of Two Million Kroners.**

21. That as the steamer may be from time to time employed in tropical waters during the term of this Charter, steamer is to be docked, bottom cleaned and painted whenever Charterers and Master think necessary, but at least once in every six months, and payment of the hire to be suspended until she is again in proper state for service.

22. That the Owners are to provide ropes, falls, slings and blocks, necessary to handle ordinary cargo up to three tons (of 2240 lbs. each) in weight, also lanterns for night work.

23. Steamer to work night and day, if required by Charterers, and all steam winches to be at Charterer's disposal during loading and discharging, and steamer to provide ~~sufficient power~~ for night work, ~~same both by~~ day and night as required, Charterers agreeing to pay extra expense if any incurred by reason of night work, at the current local rate **(after deducting crew's portion and expenses)**

24. That all derelicts and salvage shall be for Owners' and Charterers' equal benefit. General average, if any, to be according to York-Antwerp Rules 1890.

25. ~~That the Charterers shall have the option of continuing this Charter for a further period of~~ **Charterers to provide necessary dunnage and shifting boards, but owners to allow them use of dunnage and shifting boards on steamer. Ship not responsible for damage or shortage of cargo.**

on giving notice thereof to the Owners or their Agents ~~days~~ days previous to the expiration of the first-named term, or any declared option.

26. Charterers to have the liberty of subletting the steamer, if required by them, **but charterers remain responsible for fulfilment** and should steamer not be ready cl

27. That if required by Charterers, time not to commence before **August 15th.1917** and should steamer not be ready for delivery at port of delivery on or before **September 15th.1917** Charterers or their Agents to have the option of cancelling pe this Charter, at any time not later than the day of steamer's readiness.

28. It is also mutually agreed, that this Charter is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States approved on the 13th day of February, 1893, and entitled "An Act relating to Navigation of Vessels, etc."

29. ~~A freight brokerage of~~ **And a commission of** ~~five~~ per cent. on the ~~freight brokerage of~~ per cent. is due to **Norton, Lilly & Co. as freight earned** estimated amount of Freight, is due and payable by Owners, on signment hereof to GEO. HELLIESEN. Ship lost or not lost, ~~if not on any extension or renewal of this Charter or purchase of vessel.~~

30. Penalty for non performance of this Contract, estimated amount of damages.

Steamer not to be re-chartered to Tweedie Trading Company

FLINT, COERING & CO.Ltd.
(sgd) George Flint
Chairman

~~By cable authority from~~

(sgd) T.J.Baus — Witness to the signature of

dated 191

(sgd) NORTON, LI... & COMPANY
Agent.

(sgd) Warren S.Gulick — Witness to the signature of

If the owners shall have exercised due diligence to make the steamer in all respects seaworthy and to have her properly manned, equipped and supplied, it is herety agreed that in case of danger, damage, disaster, resulting from faults or errors in navigation, or in the management of the steamer, or from any latent defect in the steamer, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of the shipment or at the beginning of the voyage (provided the latent defect or the unseaworthiness was not discoverable by the exercise of due diligence, the consignees or owners of the cargo shall, nevertheless, pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril, all with the same force and effect, and to the same extent, as if such danger, damage or disaster had not resulted from or been occasioned by faults or errors in navigation, or in the management of the vessel or any latent defect or unseaworthiness.
If Underwriters after Average condemn steamer, Charter to be null and void.
Wherever the word Owners appear in this Charter, it is understood to mean Time Chartered Owners.

56.

[fol. 55] in receipt of a cable from Houlders, London, inquiring if time charter owners are agreeable to accepting redelivery of this steamer North of Hatteras about the end of July. The steamer is reported as having sailed today from Santos to Hampton Roads.

Time charter owners are agreeable to Houlders making redelivery to them about the end of this month, under certain conditions, and will begin negotiations with Houlders to so arrange provided you are agreeable to accepting delivery of steamer, under your time charter, when vessel is ready. If you are agreeable to such an arrangement, we shall be pleased to have your immediate advices to that effect, in order that we may telegraph Philadelphia this A. M. thereby giving time charter owners the opportunity of cabling London today.

As you may be aware, Houlders have, under their present time charter, until the end of August to make redelivery and we presume you would rather agree to delivery the end of this month than have Houlders engage steamer in probably a West India round upon completion of present voyage, which might make her delivery to you in September.

Yours very truly, Geo Hellieson, Inc. E. B. Searle, Vice-Pres.

(Here follows Respondent's Exhibit C, marked side folio page 56.)

[fol. 57] In United States District Court

[Title omitted]

Final Decree—September 30, 1925

An interlocutory decree having been duly entered herein on the 16th day of June, 1924, whereby this matter was referred to Mark W. Maclay, Jr., Esq., as Commissioner, to determine libellants' damages and report the same to this court, and said Commissioner, after hearings duly held, having assessed the libellants' damages at the sum [fol. 58] of $32,560.57, with interest from August 1, 1917, to

September 1, 1925, amounting to $15,387.03, making a total of $48,337.60, and having filed his report with the Clerk of this Court on the 27th day of August, 1925; and the libellants' costs having been duly taxed at the sum of $477.57.

Now on motion of H. Alan Dawson and Burlingham, Veeder, Masten & Featey, proctors for libellants, it is

Ordered that the Commissioner's report, filed herein on the 27th day of August, 1925, be and the same hereby is in all respects confirmed; and it is further

Ordered, adjudged and decreed that the libellants, George Flint, Samuel W. Collins and Ludwig T. Brehm, doing business under the name of Flint, Goering & Co., Ltd., a limited Partnership, recover of and from the respondent, Robins Dry Dock & Repair Company the sum of Forty eight thousand three hundred and thirty seven and 60/100 Dollars ($48,337.60) damages, as reported by said Commissioner, with interest thereon from September 1, 1925, to the date of the entry of this decree, amounting to Two hundred forty one and 69/100 Dollars ($241.69), together with the sum of Four Hundred Seventy seven and 57/100 Dollars ($477.57), costs as taxed, making in all the sum of Forty nine Thousand Fifty six and 86/100 Dollars ($49,056.86), with interest thereon until paid, and that said libellants have execution therefor, and it is further

[fol 30] Ordered that unless this decree be satisfied or an appeal taken therefrom within ten days after the service of a copy hereof, with notice of entry, upon the proctors for the respondent herein, the respondent and its stipulators cause the engagements of their respective stipulations to be performed, or execution may issue against their goods, chattels and lands to satisfy this decree.

F. A. Winslow, U. S. D. J.

In United States District Court

[Title omitted]

Notice of Appeal

Sirs: Please take notice that the respondent hereby appeals to the United States Circuit Court of Appeals for [fol 31] the Second Circuit, from the final decree entered

herein on September 30, 1925, and from each and every part of said decree.

Yours, &c., Barry, Wainwright, Thacher & Symmers, Proctors for Respondent.

Dated New York, October 14, 1925.

To H. Alan Dawson, Esq., Burlingham, Veeder, Masten & Fearey, Esqs., proctors for libelants; Alex. Gilchrist, Jr., Esq., clerk.

[fol. 61] In United States District Court

[Title omitted]

Assignments of Error

The respondent-appellant assigns as errors of the District Court:

1. The finding and decision that a suit for the recovery of damages growing out of injury to a vessel while in a graving dock and outside navigable waters, is within the admiralty jurisdiction of the court.

2. The finding and decision that under the allegations of the libel the libelants were entitled to recover against the respondent in [illegible]

3. The finding and decision that any negligence on the part of the respondent was the proximate cause of any loss to the libelants.

4. The finding and decision that the contract between the vessel owners and the respondent for the repair of the [illegible] vessel was a contract for the benefit of the libelants.

5. The finding and decision that the libelants had a property interest in the vessel at the time of the injury of said vessel.

6. The finding and decision that the respondent was under any greater legal obligation to the libelants in the premises than to refrain from intentionally, wilfully or maliciously injuring the libelants.

7. The finding and decision that the libelants, as charterers, had a property interest in the "Bjornefjord" and might recover from the respondent on the ground that negligent performance of the contract between respondent and the vessel owners (to which contract libelants were not parties), deprived the libelants of the use of the vessel.

8. The refusal of the court to find and decide that any loss of profits sustained by the libelants as charterers growing out of the injury of the vessel while the vessel was off hire pursuant to the provisions of the charter between the owners and the libelants, resulted proximately from the limitations of the libelants' charter with the owners and not from any negligence on the part of the respondent.

9. The finding and decision that on the pleadings and the proof the libelants were entitled to recover against the respondent.

Barry, Wainwright, Thacher & Symmers, Proctors for Respondent-Appellant

[fol. 63] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Burlingham, Veeder, Masten & Fearey, Proctors for Libellants. Barry, Wainwright, Thacher & Symmers, Proctors for Respondent.

Dated December , 1923.

[fol. 64] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 65] In United States Circuit Court of Appeals for the Second Circuit

George Flint, Samuel W. Collins, and Ludwig T. Brehm, Doing Business under the Name of Flint Goering & Co., Ltd., a Limited Partnership, Libellants-Appellees,

against

Reeds Dry Dock & Repair Company, Respondent-Appellant

Before Rogers, Hand, and Mack, Circuit Judges

H. Alan Dawson, Burlingham, Veeder, Masten & Fearey, for libellants-appellees; Roscoe H. Hupper, William J. Dean, counsel.

Barry Wainwright, Thacher & Symmers, for respondent-appellant; James K. Symmers, advocate.

Opinion

Mack, Circuit Judge:

This proceeding arose out of the same accident on which the libel in rem considered in The Bjornefjord, 271 Fed. [fol. 66] 682, was based. We there held that the time charterer had no cause of action in rem for the estimated value of the use of the vessel for fourteen days, due to the negligence of the instant respondent in letting the spare propeller fall while installing it in the ship. The basis of that decision was that instant respondent was an independent contractor properly selected by the owner; that under the charter party the steamer was properly withdrawn for repairs and the only obligation of the owner was to return her as soon as she should have been put into an efficient state to resume service, payment of hire ceasing during the interval.

After that decision the present libel was filed to recover these same damages from respondent. Negligence and the resulting fourteen days' delay are conceded; liability is, however, denied; in contract, because respondent was a stranger to the charter party and libellants strangers to the contract for repairs; in tort, because the steamship was at no time in the possession of or being used by libellants during the two weeks' delay. Respondent further alleges

that the master of the steamship made claim against it for $4,271.21, "the amount of the alleged damages accruing to said master's principals by reason of the delay of said steamship," entailed by defendant's negligence, which sum respondent paid December 7, 1917, at which date the master executed a general release, "by which release said steamship, her owners, etc., and said master discharged respondent from all actions, damages, claims and demands [fol. 67] whatsoever, and especially of and from all claims and demands arising out of towage and or detention of said steamship in any way due to the breaking of said spare propeller on said vessel on or about July 31, 1917." Respondent further alleges that at the time of payment it had "no knowledge nor any information as to the exact ownership of said steamship Bjornefjord or as to her relations by charter party or otherwise to the libellants in this case, and in making said payment to said master and in taking the release executed by said master this respondent procured said master to execute said release, as above stated, in full settlement of all the claims of said master, as master or otherwise, and all claims of the owners, etc., of said steamship Bjornefjord, to wit, all parties having any property interest in said steamship."

It appears from the evidence that the damages claimed, $23,068.08, represented the difference between the market value of the steamer for the fourteen-day loss of use, and $2,517.76 or thereabouts, the charter hire for that period; further, that on or about August 10, 1917, nearly four months prior to the execution of the release by the master, respondent was notified by appellants of their claim as "time chartered owners" at the rate of approximately $3,000.00 per month for the period of detention. In the notification libellants stated "we must accordingly advise you that we shall hold you liable and responsible for our damages either direct to us or through the owners. We will submit a statement of the damages and claims so soon as the amount is definitely known."

[fol. 68] At the trial it was agreed that the master, if called, would testify that he was acting for the owners and made a settlement of their claim with respondent, and that in making such settlement he did not put forward the claim of the time charterers and did not pretend to be settling that claim.

The matter is now before us on an appeal from a decree in favor of libellants for the principal sum of $32,550.57, with interest thereon from August 1, 1917, and costs.

(1) There is clearly no direct liability in contract. Libellants were not parties to the repair contract, and inasmuch as they were not and were not intended to be the sole beneficiaries thereof, or indeed in any respect beneficiaries, they did not become privies thereto or entitled to sue for breach thereof, even under the most liberal rules that permit third parties to sue on a contract made for their benefit.

Neither Pennsylvania Cement Co. v. Bradley Contracting Co., 7 Fed. (2d) 823, nor Town of Readsboro v. Hoosac Tunnel & W. R. Co., 6 Fed. (2d) 733, is in point. In the Cement Company case the agreement between the City and the contractor expressly provided that the latter should be solely responsible for all physical injuries to persons or property on account of the performance of the work; in the Readsboro case the defendant, while originally no party to the contract sued upon, expressly assumed the obligations of its predecessor in title.

[fol. 69] (2) As to a liability in tort, we are met at the threshold with an objection to the jurisdiction of a court of admiralty, based on the contention that the tort, if any, having been committed while the ship was in drydock, was not "committed and effective on navigable waters." (Gonsalves v. Morse Drydock & Repair Co., 266 U. S. 171, 172). We feel ourselves however, concluded as to this contention by The Jefferson, 215 U. S. 130, and The Robert W. Parsons, 191 U. S. 17.

(3) Judge Mayer, sitting in the District Court, held in The Aquitania, 270, Fed. 239, that a time charterer could recover his damages for the loss of use of a vessel during the period of its repair in a libel in rem against the ship which had negligently collided with and damaged the charterer's vessel, and this though the owner of the injured vessel likewise had a libel pending in the same Court to recover his damages, consisting of repair expense and loss of use during the period of repairs.

In Hines, Agent v. Sangstad S. S. Co., et al., (C. C. A. 1), 296 Fed. 502, under a joint libel filed by the owner and the time charterer of the vessel damaged by collision, the

time charterer while not entitled to claim that the vessel was off hire during the repair time, recovered from the damaging vessel the amount of charter hire that it paid to the owner for the period of delay.

In The S. S. Binghampton case, decided by Judge Mayer and discussed by him in his opinion in The Aquitania, the time charterer recovered the difference between the market [fol. 70] value of the use of the damaged vessel for the period of the delay, less the very much smaller charter hire for the same period. And in The Beaver, 219 Fed. 139, a similar right of recovery in the time charterer was assumed.

Without adopting Judge Mayer's language that "the ship * * * in so far as its capacity to earn freight is concerned * * * is the charterer's," but on the contrary adhering to the views expressed by us in Booth American Shipping Co. v. Importers & Exporters Insurance Co., 9 Fed. (2d) 704, that "no property interest, not even possession, had been created in the vessel as an agent" of the time charterer, we concur in the result reached in the Aquitania case and the cases cited therein, that the damaged ship in those cases was in the active service of the charterer, while in the instant case it was off hire at the time of the injury, furnishes no basis for distinguishing the cases. The charter period had not expired; she was properly off hire but would have been in active service again but for the injury; even active service gave the time charterer no property right in or possession of the vessel. The difference in the facts furnishes no test of respondent's liability or of the measure of damages, even though it may result in a different apportionment of damages; if the vessel be temporarily off hire, the total damage would be divisible, the owner receiving an amount equivalent to the lost charter hire, the charterer the difference between the market value of the use and the charter hire; if not off hire, [fol. 71] the entire damages for the delay would go to the charterer, the measure of damages, however, in both cases would be the market value of the use of the vessel for the period of delay.

Clearly, the result reached involves no injustice to respondent. Its liability for its tortious act is the actual damage done to the combined interests in the ship. The mea-

ure of the total recovery is the market value of the loss of the use. If there had been no charter, the entire loss would have been sustained by the owner; therefore he could have recovered that amount for himself. The wrongdoer has no interest in and should not benefit because of the contractual obligations of the shipowner to the charterer or the absence of any liability of the owner to the charterer for respondent's negligence. This non liability of the owner is neither a test nor a measure of the wrongdoer's liability, for though the owner be not directly liable to the charterer, he may nevertheless be liable over to him as a trustee for so much of the recovery from the wrongdoer as exceeds his own personal loss. In The Winkfield (1902), Probate, 42, despite the fact that the Postmaster General, because of his official immunity was free from liability to the owners of mail matter destroyed by the negligence of a ship that collided with the vessel on which it was being carried, the Court of Appeals held that he was nevertheless entitled to the full value of the material destroyed. And in Rodocanachi v. Milburn, 18 Q. B. Div. 67, the owner of the goods lost through negligence was entitled to recover [fol. 72] the full market value from the wrongdoer although he was bound under a contract to sell them below that value if they had arrived safely at the port of destination. See, too, 39, Harvard Law Review, p. 760.

In the very interesting opinion of Collins, M. R. in The Winkfield, supra, the history of the relative rights of bailor and bailee against wrongdoers is pointed out. Originally only the bailee could sue; in the later development either bailor or bailee could bring the action. If the bailee sued, he would recover the entire value of the property. But though he be not directly liable to his bailor for the negligence of the third person, he, like the Postmaster General in The Winkfield, held the excess of recovery over his own personal loss in trust for the bailor or owner of the mail matter respectively.

It is unnecessary to determine in the instant case whether the charterer's right to recover for his loss is direct against the wrongdoer, enforcible by a libel independent of that which the shipowner but for the release could have brought for his damages, or whether it is indirect based upon the

equitable obligation of the shipowner to the charterer, in analogy to the bailment and the Winkfield case; for no error is assigned because of the failure to join the shipowner as libellant pursuant to the practice adopted in the Sangstad case, supra. Even if the the right be derivative and equitable in its nature, the settlement made and the release accepted, as it was in this case with full knowledge [fol. 73] of libellants' claim, could afford no defense in admiralty, the more so when, as here, neither party intended it to operate as a release of more than the owner's own personal damages.

It is urged, however that the loss suffered by libellants cannot be deemed the proximate result of respondent's negligence. It is indeed true that ordinarily the damage suffered by one whose interest in the party or thing directly injured is due to some contractual relation, is deemed too remote to permit recovery against the wrongdoer, unless the wrongful act be done with intent to affect the contractual relation. Typical cases are Conn. M. L. Ins. Co. v. N. Y. & N. H. R. R. Co., 25 Conn. 265, in which a life insurance company was denied recovery against one who had killed the insured; and Taylor v. Neri, 1 Esp. N. P. 386, in which a theatre manager was held not entitled to recover against one, who by assaulting an actor, had disabled him from fulfilling his engagement with plaintiff. See, too, Brink v. Wabash Ry. Co., 160 Mo. 87; Dale v. Grant 34 N. J. L. 142; Simpson v. Thompson, L. R. 3 A. C. 279. In Remorguage v. Bennetts (1911), 1 K. B. 243, recovery was denied the owners of a steamtug for the loss of remuneration that they would have earned if a towage contract then in process of completion had not been prevented by respondent's negligent collision with and sinking of the ship that was being towed. In all of these cases the damage to plaintiff or libellant was deemed too remote.

The conceptions of remote result and proximate cause are, however, not fixed and permanent; in the development [fol. 74] of legal principles and their adjustment to social needs the boundary lines have been and will continue to be extended. In our day the damages suffered by one who eats diseased food intended by the manufacturer to be marketed as pure food are deemed to be the proximate result of the manufacturer's negligence and therefore recoverable from

the manufacturer, even though the injured person had direct relations only with an intermediate and dependently contracting dealer. Ketterer v. Armour & Co., 247 Fed. 921. See, too, Johnson v. Cadillac Motor Car Co., 261 Fed. 878.

Furthermore, unlike the insurance, towing and analogous cases, recognition of libellants's right of action involves no extension of responsibility for results beyond those reasonably to be anticipated. The damages which respondent must meet are limited to reimbursement for the proximate results of its negligence. As this, however, has directly affected several parties, each is entitled to his just share of the total amount.

Through illness, Judge Rogers was prevented from participating in this decision.

Decree affirmed.

[fol. 75] In United States Circuit Court of Appeals

Appeal from the District Court of the United States for the Southern District of New York

[Title omitted]

Judgment. Filed June 16, 1926

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On Consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court [fol. 76] be and it hereby is affirmed with interest and costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

L. H. J. W. M.

[File endorsement omitted.]

[fol. 77] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 78] In Supreme Court of the United States

Order Allowing Certiorari—Filed October 25, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U. S.
FILED
WM. R. STANSBURY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1926.

No. [redacted] 102

The petition of Robins Dry Dock & Repair Company for a writ of certiorari directed to the Circuit Court of Appeals for the Second Circuit to bring before this court the case of:

GEORGE FLINT, SAMUEL W. COLLINS AND LUDWIG T. BRUHN, DOING BUSINESS UNDER THE NAME OF FLINT GOERING & CO., LTD., A LIMITED PARTNERSHIP,

Libelants-Appellees,

vs.

ROBINS DRY DOCK & REPAIR COMPANY,

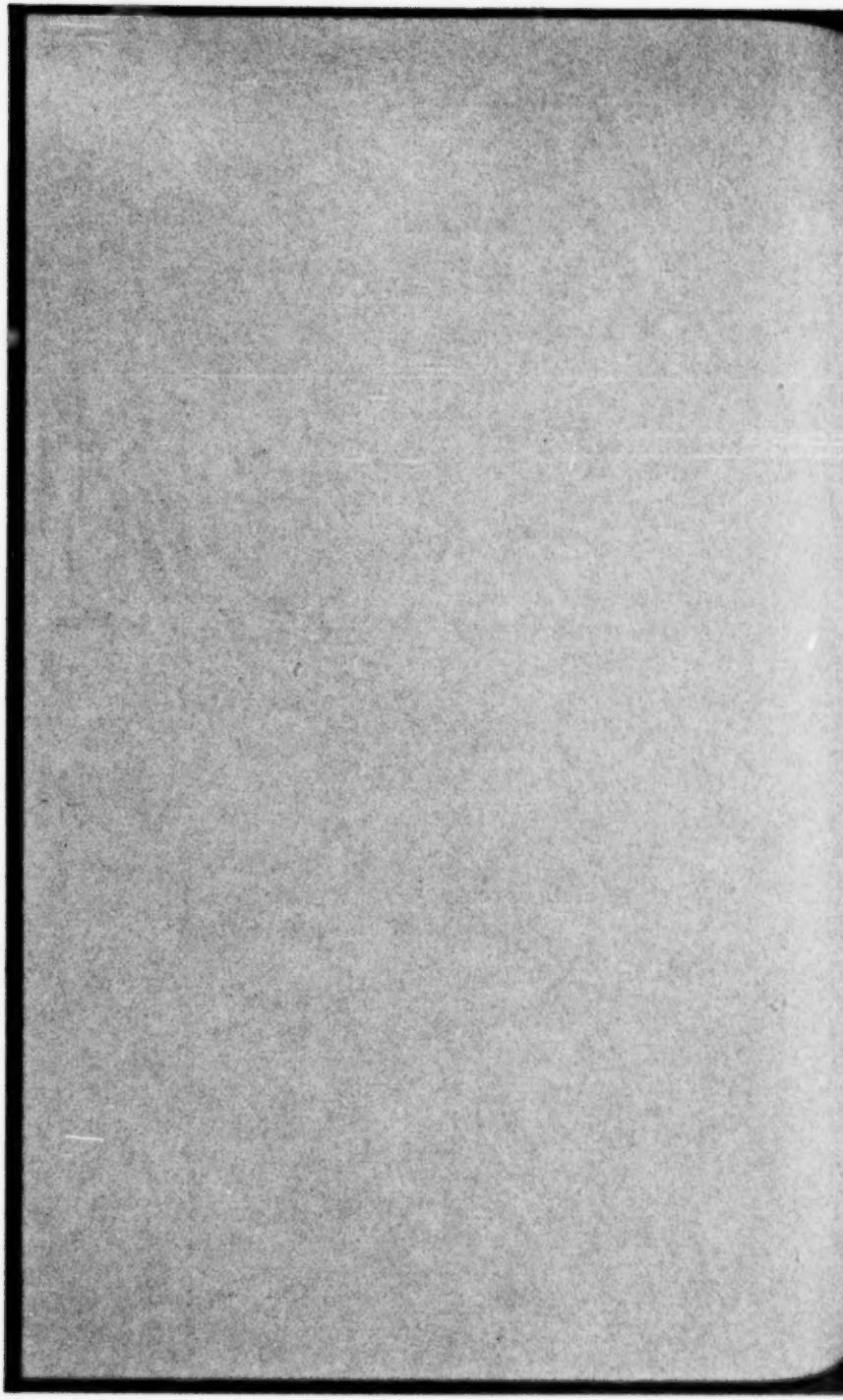
Respondent-Appellant.

PETITION AND BRIEF.

JAMES E. SUMNER,
JOHN C. CRAWLEY,
for the Petitioner.

120 Pet. 1926

[redacted]



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Supreme Court of the United States.

OCTOBER TERM, 1926.

No. .....

The petition of Robins Dry Dock & Repair Company for a writ of certiorari directed to the Circuit Court of Appeals for the Second Circuit to bring before this court the case of:

GEORGE FLINT, SAMUEL W. COLLINS and LUDWIG T. BREHM, doing business under the name of FLINT GOERING & CO., LTD., a limited partnership,

Libelants Appellees,

vs.

ROBINS DRY DOCK & REPAIR COMPANY,

Respondent Appellant.

PETITION.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Your petitioner prays for a writ of certiorari to review a final decree in admiralty by the Circuit Court of Appeals for the Second Circuit rendered on June 14, 1926 (Record, p. 75), affirming a decree of the District Court for the Southern District of New York.

Statement.

All of the facts were stipulated at the trial.

The petitioner, a ship repair company, contracted with the owners of the Steamship "Bjornefjord" to repair that

vessel (fol. 27). In the performance of the contract, the petitioner's workmen negligently injured the steamer (while she lay in a graving dock) so that she was out of commission for a period of two weeks beyond the time when she would otherwise have been restored to the owners (p. 66).

Liability for the owners' loss was not disputed (p. 66). The petitioner settled the owners' claim and obtained a release (p. 66).

But the petitioner denied liability to the libelants appellees, who were time charterers of the vessel. Their charterparty was not a demise (p. 25). It left the manning, victualing and navigation of the vessel with the owners, and in all other respects was in a form that gave the charterers no property in the vessel (p. 25; p. 70).

When placed by her owners in the petitioner's custody for repairs, the vessel had been withdrawn from hire in accordance with the charterparty, and she so remained off hire until she had been redelivered by the petitioner to the owners and by them replaced in the service of the charterers (p. 66).

There was no privity of contract between the petitioner and the charterers (fol. 57), and the petitioner first learned of the charterparty after the accident (fol. 81).

The charterparty had been made in 1913, for a period of five years (p. 25). When the accident happened, in 1917, freight rates were more than fourteen times as high as they had been when the charter was made, so that the charterers lost a profit on a subcharter of their own, amounting to some $32,000 (fol. 150).

After an unsuccessful suit *in rem* against the vessel to recover for this loss (*The Bjornefjord*, 271 Fed 682, C. C. A., 2nd), the charterers brought the present suit in admiralty against the petitioner, alleging that the repair contract made by the shipowners with the petitioner was a contract for the charterers' benefit (Libel, p. 2).

Both the District Court (Southern District of New York) and the Circuit Court of Appeals for the Second Circuit, have held the petitioner responsible for the charterers' lost profits,

the District Court on the ground that the charterers had a property interest in the ship (fol. 108).

This ground of decision was rejected by the Circuit Court of Appeals, which held that the charterers had no property in the vessel (p. 70), and that there was no direct liability running from the petitioner to the charterers in contract (p. 68). At the same time the Circuit Court of Appeals held the petitioner liable to the charterers upon a theory of trust relationships, which may be summarized in three propositions:

First, that the shipowners, if they had seen fit to do so, might have recovered from the petitioner the full market value of the vessel's use, irrespective of the fact that they were committed by their charterparty to earning with their vessel less than the market rate of freight.

Second, that if the shipowners had recovered from the petitioner the full market value of the vessel's use, the shipowners would have held as trustees for the charterers the surplus recovered in excess of the shipowners' actual monetary loss.

Third, that in justice the petitioner should be held liable for the full market value of the vessel's use; that the petitioner

> "has no interest in and should not benefit because of the contractual obligations of the shipowner to the charterer or the absence of any liability of the owner to the charterer for the (petitioner's) negligence;"

and that—

> "It is unnecessary to determine in the instant case whether the charterer's right to recover for his loss is direct against the wrongdoer, enforcible by a libel independent of that which the shipowner but for the release could have brought for his damages, or whether it is indirect based upon the equitable obligation of the shipowner to the charterer, in analogy to the bailment and the *Winkfield* case (1902) Probate, 42; for no error is assigned because of the failure to join the shipowner as

libellant pursuant to the practice adopted in the *Sanostad* case, 266 Fed. 502. Even if the right be derivative and equitable in its nature, the settlement made and the release accepted, as it was in this case with full knowledge of libellants' claim, could afford no defense in admiralty, the more so when, as here, neither party intended it to operate as a release of more than the owner's own personal damages" (Opinion, p. 71).

Reasons for Granting the Petition.

Your petitioner urges that the decision of the Circuit Court of Appeals should be reviewed by this court for the following reasons:

1. In view of the large number of vessels now operating under charterparties it is desirable that this court define the liability of repair companies and others that may contract with the owners of such vessels and later find themselves subjected to the claims of charterers for damages.

2. The decision of the Circuit Court of Appeals conflicts with the principle of the decisions of this court in *Savings Bank* v. *Ward*, 100 U. S. 195, and *German Alliance Ins. Co.* v. *Home Water Supply Co.*, 226 U. S. 220, and is opposed to the great weight of authority, in holding that if Peter negligently breaches his contract with Paul, Peter is liable as a tort feasor to a stranger whose own independent contract with Paul has thereby become less valuable.

3. The principle of the decisions of the highest English courts upon this important question of commercial law is contrary to the present decision.

La Societe etc. v. *Bennetts* (1911), 1 K. B. 243.
Simpson v. *Thomson* (1877), 3 A. C. 279.
Pollock on Torts (11th Ed.), p. 356.

4. The first premise of the present decision,—that the shipowners might have recovered from the petitioner the full

market value of the vessel's use, although their actual loss was less,—is opposed to the decision of the English Court of Appeal in the recent case of *The Susquehanna* (1925), 134 L. T. R. 45, and is not supported by any decision of this court.

5. If the petitioner's injury to the ship can be said to be a tort as to the charterers, there was no jurisdiction below, because the ship was injured while in a graving dock, and the alleged tort was not "committed and effective on navigable water" (Record, p. 69): *Gonsalves* v. *Morse Dry Dock & Repair Co.*, 266 U. S. 171 2.

6. If the petitioner's liability rests upon the grounds stated by the Circuit Court of Appeals, the cause of action is purely equitable and is not within the admiralty jurisdiction.

The Eclipse, 135 U. S. 599, 608.
Minturn v. *Maynard*, 17 How. 477.

WHEREFORE, your petitioner prays that this honorable court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Second Circuit to bring up the case to this honorable court for such proceedings therein as may be just.

ROBINS DRY DOCK & REPAIR COMPANY
by
A. Calder Mayo
Its Proctor

STATE OF NEW YORK, County of Kings, } ss.:

A Holden Dyer, being duly sworn, deposes and says that he is Vice President of Robins Dry Dock & Repair Company, the petitioner herein; that he has read the foregoing petition and that the facts therein stated are true to the best of his knowledge, information and belief.

Sworn to before me this 30th day of July, 1926. } A Holden Dyer

WILLIAM H. WILSON, JR.,
Notary Public, Kings County 387
Commission expires March 30, 1927.

I hereby certify that I have examined the foregoing petition, and that, in my opinion, the same is well founded and is entitled to the favorable consideration of this Honorable Court.

JAMES K. SYMMERS,
Of counsel for petitioner.

BRIEF IN SUPPORT OF PETITION.

Application is made under Section 240(*a*) of the Judicial Code for certiorari to review a final decree in admiralty rendered by the Circuit Court of Appeals for the Second Circuit on June 14, 1926, and shown at page 75 of the Record.

POINT I.

The basis upon which liability was imposed by the Circuit Court of Appeals is not cognizable by an admiralty court.

The two suggested grounds of liability considered and rejected by the Circuit Court of Appeals, one, that the charterers were the intended beneficiaries of the repair contract; the other, that the charterers had a property right in the vessel, are so opposed to authority that they need not be discussed again here. (Opinion of C. C. A., Rec. pp. 68 and 70.)

It may be mentioned, however, that the libel alleged the existence of the first ground of liability, *i. e.*, that the charterers were entitled to recover from the petitioner upon some theory of liability analogous to the doctrine of *Lawrence v. Fox*, 20 N. Y. 268 (Record, p. 3); and that the District Court (following a District Court decision rendered by another judge in the case of *The Aquitania*, 270 Fed. 239) based the charterers' right to recover only on the second ground above mentioned, *i. e.*, that the charterers had a property interest in the vessel herself. (Opinion, D. C., Rec. p. 36.)

After weighing both these suggested grounds of liability the Circuit Court of Appeals expressly found both of them insufficient and itself predicated liability upon a novel theory.

This new basis of liability assumes that the petitioner

would have been liable to the shipowners for the full market value of the vessel's use during the period of her detention; that for the excess which they might have recovered beyond their own personal damages the shipowners would have been accountable as trustees to the charterers; and, finally, that in obtaining a release of the shipowners' claim without having paid the shipowners as consideration therefor the full market value of the vessel's use during the period of her detention, the petitioner in some way rendered itself liable to the charterers. (Opinion, C. C. A., Record, p. 72.)

The assumption of the Circuit Court of Appeals that the shipowners, if they had seen fit to do so, might have recovered from the petitioner the full market value of the vessel's use is not supported by any decision of this Court, and is contrary to a recent decision of the English Court of Appeal in the case of *The Susquehanna*, 134 L. T. R. 45, where it was held that the measure of a shipowner's recovery for the wrongful detention of his vessel is the value to the owner of the use to which he reasonably would have put the vessel.

But even assuming that the first proposition stated by the Circuit Court of Appeals be correct, and that the shipowners might have demanded and recovered from the petitioner an amount equal to the full market value of the vessel's use, it seems insufficient to say, as the Circuit Court of Appeals has said, that the charterers can recover simply because the shipowners failed to recover all they might have recovered from the petitioner. The release given by the shipowners to the petitioner was a release of all of the shipowners' claim (Record, p. 30), and it is immaterial that the consideration for the release was an amount equal only to the shipowners' personal loss, or that the release did not purport to discharge the petitioner from possible claims by the charterer. Nor was the petitioner concerned with the shipowners' alleged duty to share the collection with the charterers. Having fairly given the release, the shipowners could not themselves have asserted any further claim against the petitioner, no matter what the shipowners liability to

the charterers may have been for having failed to collect more. Hence, if the petitioner was liable in first instance only to the shipowners, as the opinion of the Circuit Court of Appeals would seem to concede, it is difficult to understand how the petitioner became liable to the charterers, in an admiralty suit, after the shipowners had released the petitioner.

If any liability were to exist at all upon these facts, the liability would be enforceable only in an equity suit, in which the petitioner would be apprised by the pleadings of the nature of the liability sought to be imposed.

> "So far as the creditors and intervenors were concerned, if the former desired to wind up the trust, or the latter to enforce an alleged contract of sale, which is indeed what is asked by this intervention, they should have resorted to a different tribunal. While the court of admiralty exercises its jurisdiction upon equitable principles, it has not the characteristic powers of a court of equity. It cannot entertain a bill or libel for specific performance, or to correct a mistake, *Andrews* v. *Essex Ins. Co.*, 3 Mason, 6, 16; or declare or enforce a trust or an equitable title, *Ward* v. *Thompson*, 22 How. 330; *The Amelia*, 6 Ben. 175; *Kellum* v. *Emerson*, 2 Curtis, 79; or exercise jurisdiction in matters of account merely, *Grant* v. *Poulton*, 20 How. 162; *Mautran* v. *Maynard*, 17 How. 477; *The Ocean Belle*, 6 Ben. 253; or decree the sale of a ship for an unpaid mortgage, or declare her to be the property of the mortgagees and direct possession of her to be given to them. *Bogart* v. *The John Jay*, 17 How. 399."
>
> *The Eclipse*, 135 U. S. 599 at 608.

POINT II.

The holdings below are contrary to the applicable decisions of this court, and to the decisions of the highest English courts.

The decision below holds that if a repairman receive a chattel from its owner and thereafter negligently injure the chattel, the repairman becomes liable to strangers who may have contracted with the owner respecting the chattel, even in the absence of any privity of contract between the stranger and the repairman.

The instances in which one becomes liable to a stranger for the consequences of his negligence in the performance of a contract were reviewed by this court in the case of *Savings Bank v. Ward*, 100 U. S. 195, and were also fully reviewed by the Court of Appeals of New York in the case of *MacPherson v. Buick Motor Company*, 217 N. Y. 382.

The facts of the present case bring it within none of the categories heretofore considered to be exceptions to the general rule that one who in the performance of his contract injures the subject matter thereof, is liable only to the other contracting party and to the owner of the injured chattel.

The rule is thus stated by Pollock:

> "When a binding promise is made, an obligation is created which remains in force until extinguished by the performance or discharge of the contract. Does the duty thus owed to the promisee constitute the object of a kind of real right which a stranger to the contract can infringe and thereby render himself answerable *ex delicto*? In other words, does a man's title to the performance of a contract contain an element analogous to ownership or possession. The general principles of law (notwithstanding forms of speech once in use and warranted by considerable authority) seem to call for a negative answer. It would confuse every accustomed boundary between real and personal rights, dominion and obligation, to hold that one who prevents Andrew from performing his contract with Peter becomes *ipso facto* a kind of trespasser against Peter."
>
> (Pollock on Torts (11th Ed.), p. 356.)

The principle of the English cases analogous to the one at bar is illustrated in *Simpson* v. *Thomson*, (1877) L. R., 3 App. Cas. 279, and in *La Societe Anonyme de Remorquage a Helice* v. *Bennetts* (1911), 1 K. B. 243.

In *Simpson* v. *Thomson*, *supra*, Lord Penzance, in discussing and rejecting the principle involved in the argument there made in behalf of respondents, said:

> "The principle involved seems to me to be this—that where damage is done by a wrong doer to a chattel, not only the owner of that chattel, but all those who by contract with the owner have bound themselves to obligations which are rendered more onerous, or have secured to themselves advantages which are rendered less beneficial by the damage done to the chattel, have a right of action against the wrong doer, although they have no immediate or reversionary property in the chattel, and no possessory right by reason of any contract attaching to the chattel itself such as by lien or hypothecation." * * *
>
> "But if this be true as to injuries done to chattels, it would seem to be equally so as to injuries done to the person. An individual injured by a negligently driven carriage has an action against the owner of it. Would a doctor, it may be asked, who had contracted to attend him and provide medicines for a fixed sum by the year, also have a right of action in respect of the additional cost of attendance and medicine cast upon him by that accident? And yet it cannot be denied that the doctor had an interest in his patient's safety. In like manner, an actor or singer bound for a term to a manager of a theatre is disabled by the wrongful act of a third person to the serious loss of the manager; can the manager recover damages for that loss from the wrong doer? Such instances might be indefinitely multiplied giving rise to rights of action which in modern communities, where every complexity of mutual relation is daily created by contract, might be most numerous and novel."

In the *Societe Anonyme* case (*supra*) a steam tug belonging to the plaintiffs was engaged in a towage contract in towing a ship, when a steamship belonging to the defendant, by the negligence of the defendant's servants, came into collision

with and sank the tow. No injury was caused to the tug or her equipment by the collision. In an action brought by the plaintiffs to recover from the defendant as damages the amount of towage remuneration which they would have earned if they had completed the towage contract, it was held that the plaintiffs had no cause of action, for, although there was negligence on the part of the defendant's servants, the loss of towage remuneration was not damage to the plaintiffs which was the direct consequence of the negligence so as to be recoverable in law.

See also

German Alliance Insurance Company v. *Home Water Supply Company*, 226 U. S. 220.

Byrd v. *English*, 117 Ga., pp. 192 *et seq.*

Cattle v. *Stockton Water Works Co.*, 10 Q. B. 453.

The decision of the Circuit Court of Appeals does not give proper consideration to the fact that the charterers had an opportunity to protect their profits either by making themselves parties to the repair contract, or by stipulating with the shipowners that the ship, when off hire to permit repairs, should be restored to service within a specified time. If either of those things has been done by the charterers, it would not be necessary to go beyond accepted principles of law to give the charterers a recovery.

POINT III.

The ship was in a graving dock, outside admiralty jurisdiction, when she was injured.

This suit was brought upon contract (libel, R. p. 3); but recovery was allowed in the District Court as for tort (opinion, Goddard, *D. J.*, Record, p. 39), and the opinion of the Circuit Court of Appeals seems to indicate that that Court also considered the petitioner's liability to be in tort, since the Court expressly found that there was no direct liability in contract (Opinion, C. C. A. at p. 68 and top of p. 69).

The courts below based their jurisdiction in tort upon the circumstance that the injury occurred while the vessel was in a graving dock, described by the District Judge as a "structure permanently resting on the shore, made by dredging and the building of a cofferdam; after the ship is floated into the dock, the gates are closed and the water pumped out" (Record, p. 34). The Circuit Court of Appeals dealt with the question of its jurisdiction in tort as follows:

> "As to a liability in tort, we are met at the threshold with an objection to the jurisdiction of a court of admiralty, based on the contention that the tort, if any, having been committed while the ship was in drydock, was not 'committed and effective on navigable waters' (*Gonsalves* v. *Morse Drydock & Repair Co.*, 266 U. S. 171, 172). We feel ourselves however, concluded as to this contention by *The Jefferson*, 215 U. S. 130, and *The Robert W. Parsons*, 191 U. S. 17." (Record, p. 69.)

It is submitted that in the case of *Great Lakes Dredge & Dock Company* v. *Kierejewski*, 261 U. S. 479, 480, and in *Gonsalves* v. *Morse Drydock & Repair Co.*, 266 U. S. 171, 172, this Court has made quite clear that at no time has this Court intended to authorize a departure from the old and familiar doctrine that in contract matters admiralty jurisdiction depends upon the nature of the transaction, and that in tort matters it depends upon the locality where the tort is

committed; that is to say, if the tort has been consummated on navigable waters, the Court has jurisdiction, otherwise not.

The Jefferson, supra, decided merely that a ship may none the less be the subject of a salvage service when she is on dry-dock and in danger of being destroyed by fire originating on land. It is evident that the Court considered salvage as growing out of, or analogous to, implied contract; and therefore considered that it was immaterial that the vessel was on land at the time; the jurisdiction of the Court in matters of contract and salvage being not dependent upon locality, but merely upon the maritime character of the transaction.

The Robert W. Parsons, supra, decided only that an admiralty court has jurisdiction of a contract for the repair of a vessel, no matter where the ship may lie when the repairs are made. It is submitted that the language used by this Court in that case is not applicable to a case of tort, and that the later cases of this Court above referred to indicate that this Court has at no time held that a tort committed upon a vessel while resting in an innavigable drydock is within the admiralty jurisdiction.

Conclusion.

It is respectfully submitted that the writ of certiorari should be granted as prayed for.

JAMES K. SYMMERS,
JOHN C. CRAWLEY,
For the Petitioners.

OCT 29 1927
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1927.

No. 102.

ROBINS DRY DOCK & REPAIR COMPANY,
Petitioner,

v.

GEORGE FLINT, SAMUEL COLLINS AND
LUDWIG T. BRIEHM, ETC.,
Respondents.

BRIEF FOR PETITIONER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

JAMES K. SYMMERS,
JOHN C. CRAWLEY,
for the Petitioner.

The Lawyers Printing Co., 115 Nassau St., New York, N. Y.

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Supreme Court of the United States.

OCTOBER TERM, 1927

No. 102

ROBINS DRY DOCK & REPAIR COMPANY,
Petitioner,

v.

GEORGE FLINT, SAMUEL COLLINS and LUDWIG T. BREHM, etc.,
Respondents.

BRIEF FOR PETITIONER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

This is a suit by the respondents, charterers of the steamship "Bjornefjord", to recover damages from the petitioner, Robins Dry Dock & Repair Company, for the charterers' loss of profits through the detention of the steamship as a result of the negligence of the petitioner while engaged in repairing the vessel pursuant to a contract with the shipowners. A decree in favor of the respondents was affirmed by the Circuit Court of Appeals for the Second Circuit [13 Fed. (2d) 3], and this Court granted certiorari [273 U. S. 679].

Statement.

In July, 1917, the petitioner contracted with the owners of the Norwegian steamship "Bjornefjord" to drydock, clean, paint and effect certain repairs upon that vessel at the petitioner's shipyard in Brooklyn (R. 2, 12).

While this work was in progress, the steamer's propeller was found to be cracked, and the owners employed the petitioner to replace it with the steamer's spare propeller (R. 12). In installing the spare propeller, the petitioner's workmen negligently allowed it to fall and break (while the vessel lay in a graving dock), with the result that a new propeller had to be cast (R. 4). On that account the steamer was detained in the petitioner's repair yard for a period of two weeks beyond the time when she would otherwise have been restored to service (R. 4).

After the spare propeller had been broken, the respondents notified the petitioner that the vessel was under time charter to them, and stated that their loss through the steamer's detention was at the rate of $75,000 a month, for which they would hold the petitioner accountable, either directly to the respondents, or through the owners (R. 10 11).

The respondents were not parties to the repair contracts between the shipowners and the petitioner (R. 12, 17). The petitioner had no notice of the respondents' charterparty until after the accident (R. 16).

The charterparty between the respondents and the shipowners had been made in 1913, for a period of five years, the owners retaining possession and command of the ship, manning, victualing and navigating her, and engaging to use her in the charterer's service (R. opposite p. 14). There was no demise of the vessel.

The rate of hire payable by the respondents to the shipowners was about $6,000 a month (R. opposite p. 14). By reason of war conditions, the use of the vessel was worth nearly fourteen times that much when the accident hap-

pened (R. 29), and the respondents had actually subchartered the vessel at a rate of more than $80,000 a month, which was somewhat less than the current rate (R. 30).

It was provided by the respondents' charterparty with the shipowners that the steamer should be drydocked for cleaning and painting at least every six months, the payment of hire to be suspended on such occasions until the ship should be again in an efficient state for service, and it was also provided that the payment of hire should be suspended during any time when the steamer might be out of commission as a result of accident to hull or machinery (R. opposite p. 14, Art. 22, 17).

The vessel had been withdrawn from service, pursuant to the first mentioned provision of the charterparty, when she was placed in the petitioner's custody by the shipowners, and she remained off hire until she had been redelivered by the petitioner to the shipowners and by them replaced in the service of the charterers (R. 30).

The petitioner denied liability to the charterers, on the ground that they had no property in the ship, were not parties or privies to the repair contract, and that their loss of profits was legally remote from the petitioner's negligence.

The petitioner settled the shipowners' claim by paying the owners $3,271.21, which is slightly in excess of the amount the shipowners would have received from the respondents if the vessel had been on hire under the charterparty during the period of detention (R. 18, 30). A release of the shipowners' claim was obtained from the master * (R. 18).

Thereafter the charterers brought a suit *in rem* against the vessel to recover for their lost profits (*The Bjornefjord*, 271 Fed. 682). It was alleged that the shipowners had breached Article 1 of the charterparty, which provided that the shipowners should maintain the vessel in an efficient

* The statement in the answer that the petitioner had no notice of the charterers' claim when settlement was made with the owners, is erroneous and should be disregarded.

state for service (charterparty, opposite p. 14). The District Court dismissed the libel on the ground that the charterers' loss fell within the charterparty exceptions against delays caused by accidents to, or breakdowns of, machinery, in respect of which delays the charterers' remedy was defined by the charterparty as relief from the payment of hire until the ship should be restored to service. That decree was affirmed by the Circuit Court of Appeals for the Second Circuit, on the ground that the charterparty did not specify the time within which the shipowners must restore the vessel to service, and that the shipowners were not liable to the charterers for delays resulting from the negligence of an independent contractor properly selected by the shipowners. *The Bjornefjord*, 271 Fed. 682.

The charterers thereupon brought this suit in admiralty against the petitioner, alleging that the repair contract made by the shipowners with the petitioner was a contract for the charterers' benefit, and claiming damages for the petitioner's breach of its alleged contractual duty to the charterers to perform the repairs in a careful manner (R. 2-3).

Before the case was tried, Judge Mayer, sitting in the Southern District of New York, decided in the case of *The Aquitania*, 270 Fed. 239, that a time charterer had a property interest in the chartered vessel, and could recover damages from a tort feasor for injury to the vessel resulting in a loss to the charterer through the vessel's detention.

Following the *Aquitania* decision, the District Court held in the present case that the respondents had a property interest in the vessel, and that the petitioner was liable to the respondents in tort (R. 19-23). The damages were assessed, on the basis of tort liability, at the difference between the subcharter hire the respondents would have received during the extra period of detention and the charter hire the respondents would have paid the shipowners in the same period (R. 29-30).

The Circuit Court of Appeals, in an opinion written by Judge Mack (Judge Learned Hand concurring), held that the

respondents had no property interest in the vessel, and that there was no direct liability on the part of the petitioner in contract; but after considering that "the result reached involves no injustice" to the petitioner (R. 40), the court affirmed the decree upon grounds that will be mentioned below, page 16 (Opinion, C. C. A., R. 37-43; 13 Fed. (2d) 3).

Summary of the Argument.

Not being parties or privies to the repair contract (Point I, *infra*, p. 6) and having no property in the vessel (Point II, *infra*, p. 6, 7), the respondents have no cause of action against the petitioner for the petitioner's negligence in the performance of its contract with the shipowners.

Neither the petitioner's breach of its contract with the shipowners, nor the petitioner's negligence in injuring the vessel, was a tort as to the respondents. The only effect of the petitioner's negligence on the respondents was to impair the value of their contract with the shipowners as to the future service of the vessel. For that result, in the absence of intent, the petitioner is not liable (Point III, *infra*, p. 7).

The grounds of liability upon which the Circuit Court of Appeals rested its decision are not cognizable by an admiralty court, and are not tenable as a matter of law (Point IV, *infra*, p. 16).

The fact that the shipowners might in other circumstances have suffered the loss that fell upon the charterers does not prevent the latter's damages from being legally remote from the petitioner's act (*infra*, p. 21).

The point here involved was not considered in the cases referred to by the Circuit Court of Appeals (*infra*, p. 24).

The injury to the ship occurred while the vessel lay in a graving dock, and a suit to recover damages for that injury is outside admiralty jurisdiction (Point V, *infra*, p. 27).

POINT I.

The respondents have no cause of action upon the repair contract between the petitioner and the shipowners.

The respondents were not parties to that contract (R. 12), and, as the Circuit Court of Appeals said, inasmuch as respondents "were not and were not intended to be the sole beneficiaries thereof, or indeed in any respect beneficiaries, they did not become privies thereto or entitled to sue for breach thereof, even under the most liberal rules that permit third parties to sue on a contract made for their benefit" (R. 39).

> "Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement to which he is not a party, he must at least show that it was intended for his direct benefit."
>
> *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U. S. 220, at 230
>
> *National Bank v. Grand Lodge*, 98 U. S. 123
>
> *Pennsylvania Steel Co. v. Ry. Co.*, 198 Fed. 721, 749

It is clear that the respondents did not make out the cause of action they alleged.

POINT II.

The respondents had no property in the ship.

The Circuit Court of Appeals recognized the fundamental error in Judge Mayer's decision in *The Aquitania* (D. C., 270 Fed. 239, and in the District Court's decision in the present case (R. 19), and expressly held that a time charterer acquires "no property interest, not even possession", in the vessel under a charterparty in the form of the present one (Opinion, Mack, C. J., R. 40).

Indeed, that proposition is so well established that it hardly requires attention.

> "If the charterparty let only *the use* of the vessel, the owner at the same time retaining its command and possession and control over its navigation, the charterer is regarded as a mere contractor for a designated service * * * it is a contract for a special service to be rendered by the owner of the vessel."
>
> *Leary v. United States*, 14 Wall. 607 and cases cited.
>
> *New Orleans Belize Royal Mail etc. Co. v. United States*, 239 U. S. 202, which involved a charterparty substantially like the present one.
>
> *Elliott Steam Tug Co., Ltd. v. The Shipping Controller* (1922) 1 K. B. 127; judgment of Scrutton, *L. J.*, at page 139.
>
> *Federated Coal and Shipping Co., Ltd. v. The King*, (1922) 2 K. B. 42, at p. 46.

The charterers had no proprietary interest in the vessel. *Osaka Shosen Kaisha v. Lumber Co.*, 260 U. S. 490.

POINT III.

The injury to the ship was not a tort as to the respondents.

The instances in which one becomes liable to a stranger for the negligent performance of a contract, were reviewed by this court in *Savings Bank v. Ward*, 100 U. S. 195, and the more recent cases in which the performance of a contract may involve a duty to third persons were catalogued by the New York Court of Appeals in *MacPherson v. Buick Motor Car Co.*, 217 N. Y. 382.

Those cases fall into two categories. (1) The cases involving an article or an instrumentality that is either inherently dangerous, or in dangerous condition, and is on that account

likely to injure the health, or destroy the life or limb, of third persons who would expectably have occasion to use the article in the ordinary way. In such a case the contractor in failing to take care commensurate with the known probabilities of danger to others, is held to have invaded the third person's right of personal security. (Cf. *Kuschbrock* v. *General Electric Co.*, 236 N. Y. 227; *Ketterer* v. *Armour & Co.*, 247 Fed. 921 [C. C. A.]. The cases in which the contractor, engaged in a public calling, has given misinformation upon which he knew a third person intended to rely (*Glanzer* v. *Shepard*, 233 N. Y. 236; as explained in *Courteen Seed Co.* v. *Hong Kong & S. B. Corp.*, 245 N. Y. 377, at 381; *Ant. and I. & S. Co.* v. *Hunt*, 312 Ill. 245; 34 A. L. R. 63, annotated p. 67).

After the decision of this case, the Circuit Court of Appeals for the Second Circuit affirmed its adherence to the general rule in the case of *The Federal No. 2* (214 F. 251; 131 where a shipowner who had been obliged to pay for the maintenance and cure of a seaman incapacitated by the negligence of another, was denied recovery of the loss from the tortfeasor, the court holding that the case was within the ordinary rule that

> "damage suffered by one whose interest in the party or thing injured is contractual, is too remote for recovery unless the wrong is done with intent to affect the contractual relations."

citing its opinion in the instant case, wherein the authorities are cited

> "Whenever a wrong or injury results from the breach of a contract merely, an action for redress, whether in form ex contractu or ex delicto, can be maintained only by a party to the contract. The obligation and duty arising out of a contract are due only to those with whom it is made. If the rule were otherwise and no privity of contract were required to sustain an action for a breach, there would be no limit to the liability which might be incurred by a contracting party. It would

extend so as to give a right of action to all persons, however remote from any connection with the original parties to a contract, or however numerous they might be, who happened to sustain a loss or suffer an injury attributable to a breach of the stipulations into which a contracting party had entered."

Davidson v. *Nichols*, 11 Allen (Mass.) 514, 517.

In *Dale* v. *Grant*, 34 N. J. L. 142, the Dale Corporation, in which the plaintiff owned stock, was the plaintiff's tenant and had contracted to supply the plaintiff with all its manufactured products. The acts of the defendant interfered with machinery of the Corporation, and in consequence the plaintiff suffered a loss under its contract with the Corporation. In holding that the plaintiff could not recover, the Court said (at p. 149):

"Doubtless, if the facts stated in this declaration are true, the plaintiffs, by the misconduct of the defendants, have sustained a loss, and so, generally, do all promisees when their promisors have been illegally obstructed in the performance of their contracts. But the law does not attempt to give full reparation to all parties injured by a wrong committed. If this were so, all parties holding contracts, if such exist, under the plaintiffs who may have been injuriously affected by the conduct of the defendants, would be entitled to a suit. It is only the proximate injury that the law endeavors to compensate; the more remote comes under the head of *damnum absque injuria*. No case touching this question was cited in the briefs of either counsel, and after considerable research, I have found but few authorities pertinent to the subject. In *Anthony* v. *Slaid*, 11 Metc. 290, the facts were these: A, who had agreed with the town for a specified sum to support all the town paupers, brought an action against B for assaulting and beating one of the paupers, whereby he, A, was put to increased expense for the pauper's cure and support. It was held the action could not be maintained, Chief Justice Shaw saying, 'It is not by means of any natural or legal relation between the plaintiff and the party injured that the plaintiff sustains any loss by the act of the defendant,

but by means of the special contract by which he had undertaken to support the town paupers. The damage is too remote and indirect. In the case cited the law affordest a remedy to the pauper for the injury inflicted, but its power did not extend a remove further, so as to embrace an injury sustained by the plaintiff in the suit arising by reason of his contract. The judicial conclusion in *Cunningham* v. *Brown* rests upon similar grounds. A creditor of a deceased person had brought an action against one who had forged a note, which, if true, the dividends to creditors had been diminished, and it was decided the suit would not lie."

In *Milton* v. *Story*, 11 Vermont, 101, the defendant had contracted to support another, who, in consequence of the defendant's breach of contract, became chargeable to the town as a pauper. It was held that the town could not recover from the defendant.

In *Brink* v. *Wabash Railway Co.* 160 Mo. 87, the deceased had contracted with his parents to support them for the remainder of their lives. He was killed by the negligence of the Railroad Company. His parents brought suit against the Railroad Company, to which a demurrer was sustained. The Court said (at p. 94):

"But there is another and still further reason why the plaintiff's petition does not state a cause of action, and that is, the damages claimed are too remote.

"There is no allegation in the petition, nor is it pretended, that plaintiff's son was killed with a wilful intent to injure the plaintiffs, and it is only under such circumstances that plaintiffs would be entitled to recover. In *Gregory* v. *Brooks*, 35 Conn. 437, it was held that when one is injured by the wrongful act of another, and others are indirectly and consequentially injured, but not by reason of any natural or legal relation, the injuries of the latter are too remote to constitute a cause of action, but the rule is different where the injury is done to one with a malicious intent to injure another through a contract relation.

"In *Taylor* vs. *Nerr*, 1 Esp. N. P. 386, it was held that damages resulting to a plaintiff by reason of the defend

ant's having assaulted and beaten an actor, whereby the latter was disabled from fulfilling an engagement with the plaintiff, are too remote."

The principle is ably and thoroughly discussed in the case of *Byrd v. English*, 117 Ga. (1902) 3+, at page 192 *et seq.* That was a case where a party to a contract was injured by reason of the failure of the other party to comply with its terms, such failure being due to the negligent act of a third person by which the performance of the contract was rendered impossible. The court, at page 193, says:

> "There is another view presented by counsel for defendants in error, which, if correct, settles beyond doubt that the court below was right in sustaining the general demurrer to the petition. It will be borne in mind that this is not an action for an injury to the person or property of the plaintiff. It is not claimed that the defendants have violated any contractual duty owed to the plaintiff. Their duty to the public in performing the work in which they were engaged was to do it in such a manner as not to negligently injure the person or property of anyone. According to this petition, the damage done by them was to the property of the Georgia Electric Light Company which was under contract to furnish to the plaintiff electric power, and the resulting damage done to the plaintiff was that it was rendered impossible for that company to comply with its contract. If the plaintiff can recover of these defendants upon this cause of action, then a customer of his, who was injured by the delay occasioned by the stopping of his work, could also recover from them, and one who had been damaged through his delay could in turn hold them liable, and so on without limit to the number of persons who might recover on account of the injury done to the property of the company owning the conduits. To state such a proposition is to demonstrate its absurdity. The plaintiff is suing on account of an alleged tort by reason of which he was deprived of a supply of electric power with which to operate his printing establishment. What was his right to that power supply? Solely the right given him by virtue of his contract with the Georgia Electric Light Company, and with that contract the defendants are not

even remotely connected. If under the terms of his contract, he is precluded from recovering from the electric light company, that is a matter between themselves for which the defendants certainly cannot be held responsible. They are, of course, liable to the company for any wrong that may have been done it, and the damages recoverable on that account might well be held to include any sums which the company was compelled to pay in damages to its customers, but the customers themselves cannot go against the defendants to recover on their own account for the injury done to the company.

* * * * * *

So also in *Connecticut Insurance Co.* v. *New York R. R. Co.*, 25 Conn. 265, it is held that where one person has contract relations with another, an injury done to the latter which affects disastrously those relations, does not constitute a legal injury to the former. From the opinion delivered by Storrs, J., we quote the following very pertinent remarks: "Such are the complications of human affairs, so endless and far reaching the initial promises of man to man in business and in matters of money and property, that death is a death produced by human agency, which does not affect the pecuniary interests of those to whom the deceased was bound by contract. To open the door of legal redress to wrongs received through the mere voluntary and facultative relation of a contractor with the immediate subject of the injury, would be to encourage collusion and extravagant contracts between men by which the death of either, through the intervention or default of others, might be made a source of splendid profit to the other, and would also invite a system of litigation more pestilential than our jurisprudence has yet known." To the same effect see *Lathrop* v. *Stod.* 11 Metc. 250; *Buckingham Ins. Co.* v. *Bouchey*, 39 Maine 253; *Fowler* v. *Atlantic Mutual Ins. Co.*, 6 Cush. 270. It follows from what has been said that the plaintiff's petition did not state a cause of action, and that the general demurrer thereto was properly sustained.

Reversed. Fouchet et al., 117 Ga. at pp. 193-195.

See also *Anderson Rubber Co.* v. *Anderson*, 33 Ga. App. 241.

The English Decisions.

In suits growing out of claims against the Crown for statutory compensation for "direct loss or damage by reason of interference with business" of the claimant, through the government's exercise of war powers, the English Court of Appeal has held that a charterer who has suffered a loss through the government's requisition of the chartered vessel may have a claim for loss resulting from "interference with his business", but it has been recognized in such cases that the charterer could not recover in tort for an injury to the ship resulting in his loss of the vessel's services. It was the opinion of SCRUTTON, *L. J.*, that a charterer was not even entitled to compensation as one whose "business" had been interfered with by the requisition. The learned Judge said, in passing:

> "At common law there is no doubt about the position. In case of a wrong done to a chattel the common law does not recognize a person whose only rights are a contractual right to have the use or services of the chattel for purposes of making profits or gains without possession of or property in the chattel. Such a person cannot claim for injury done to his contractual right; see on this point the judgment of Blackburn, *J.*, in *Cattle v. Stockton Waterworks Co.* (1875), L. R. 10 Q. B. 453, where a contractor making a tunnel on K.'s land claimed against a wrong doer to K.'s land, whose wrong made his contract less profitable, and was held not entitled to recover. It is for this reason that underwriters cannot sue directly a wrongdoer against property they have insured, but must proceed in the name of the assured, as explained by Lord Penzance in *Simpson v. Thomson* (1877), 3 App. Cas. 279, 298. It is for this reason also that charterers under a charter not amounting to a demise do not and cannot sue in the Admiralty Court a wrongdoer who has sunk by collision their chartered ship. The same principle was applied by Hamilton, *J.*, in *Remorquage à Hélice (Société Auxiliaire) v. Bennetts* (1911), 1 K. B. 243, to prevent the owner of a tug suing the wrongdoer

who had sunk his tow, whereby he had lost the benefit of his contract of towage. When the Court of Appeal in *The Okehampton* (1913), P. 173, allowed sub-charterers to sue for the loss of their bill of lading freight through a collision by the defendants' wrongdoing, they did so, I think, because it was proved that the sub-charterers, not the owners, had contracted to carry the goods and had received them and had, therefore, a lien for the freight and sufficient possession as bailees to sue for damages to the goods: see *The Winkfield* (1902), P. 42. This is a sufficient reason for the decision, as explained by Hamilton, *L. J.*, at the beginning of his judgment. I do not think the headnote is accurate in speaking of possessory interest in the ship.

"But, secondly, at common law, the shipowner suing a wrongdoer for temporary loss of the ship's services would be entitled at common law to recover the loss of profits during that period as a direct consequence of the wrong. This is explained as regards ships by the judgments of Bowen, *L. J.*, and the House of Lords in *The Argentino*, 13 P. D. 191, 14 App. Cas. 519. It is indeed every-day practice in injury cases, where the plaintiff is given loss of earnings or profits during the time his injury lasts as the direct consequences of the injury. I used the word 'direct' because it is the word preferred after consideration of the alternatives by Lord Sumner in *Weld-Blundell v. Stephens* (1920), A. C. 956, 983. The charterer in collision cases does not recover profits, not because the loss of profits during repairs is not the direct consequence of the wrong, but because the common law rightly or wrongly does not recognize him as able to sue for such an injury to his merely contractual rights."

Elliott Steam Tug Co., Ltd., v. The Shipping Controller (1922), 1 K. B. 127, at 139-140.

The rule is thus stated by Pollock:

"When a binding promise is made, an obligation is created which remains in force until extinguished by the performance or discharge of the contract. Does the duty thus owed to the promisee constitute the object of a kind of real right which a stranger to the contract can infringe and thereby render himself answerable *ex de-*

facto? In other words, does a man's title to the performance of a contract contain an element analogous to ownership or possession? The general principles of law (notwithstanding forms of speech once in use and warranted by considerable authority) seem to call for a negative answer. It would confuse every accustomed boundary between real and personal rights, dominion and obligation, to hold that one who prevents Andrew from performing his contract with Peter becomes *ipso facto* a kind of trespasser against Peter."

(Pollock on Torts (11th Ed.), p. 356.)

In *Simpson* v. *Thomson*, (1877) L. R. 3 App. Cas. 279, Lord Penzance, in discussing and rejecting the principle involved in the argument there made in behalf of the respondents, said (pp. 289-290):

"The principle involved seems to me to be this—that where damage is done by a wrong-doer to a chattel, not only the owner of that chattel, but all those who by contract with the owner have bound themselves to obligations which are rendered more onerous, or have secured to themselves advantages which are rendered less beneficial by the damage done to the chattel, have a right of action against the wrong-doer, although they have no immediate or reversionary property in the chattel, and no possessory right by reason of any contract attaching to the chattel itself such as by lien or hypothecation." • • •

"But if this be true as to injuries done to chattels, it would seem to be equally so as to injuries done to the person. An individual injured by a negligently driven carriage has an action against the owner of it. Would a doctor, it may be asked, who had contracted to attend him and provide medicines for a fixed sum by the year, also have a right of action in respect of the additional cost of attendance and medicine cast upon him by that accident? And yet it cannot be denied that the doctor had an interest in his patient's safety. In like manner, an actor or singer bound for a term to a manager of a theatre is disabled by the wrongful act of a third person to the serious loss of the manager; can the manager

recover damages for that loss from the wrongdoer? Such instances might be indefinitely multiplied, giving rise to rights of action which in modern communities, where every complexity of mutual relation is daily created by contract, might be both numerous and novel."

See also:

Cattle v. *Stockton Waterworks Co.*, (1875) L. R. 10 Q. B. 453

Remorquage v. *Bennetts*, (1911) 1 K. B. 243

Earl v. *Lubbock*, (1905) 1 K. B., at 255

POINT IV.

The decision below is not supportable.

There was diversity of opinion below between the two courts and between each court and the respondents as to why the petitioner should be held liable for the respondents' lost profits.

The libel was drawn on the theory that the respondents were the intended beneficiaries of the repair contract made by the shipowners with the petitioner, and were entitled to sue the petitioner for breach of that contract (R. 2). The District Court, without referring to the libel, held that the respondents were entitled to recover in tort because they had a property interest in the ship (R. 19). The Circuit Court of Appeals held that there was no substance in either of those theories (R. 39-40), but that the petitioner was liable as a tortfeasor to the respondents for the following reasons:

1. The full measure of the petitioner's liability for negligent injury to a ship resulting in detention, was the market value of the use of the ship during the period of detention.

2. If the shipowners had seen fit to do so in this instance they might have recovered from the petitioner the full mar

let value of the vessel's use, notwithstanding that their own loss was less.

3. If the shipowners had so recovered the full market value of the vessel's use, they would have held as trustees for the respondents the surplus recovered in excess of the actual pecuniary loss the shipowners had suffered.

4. Therefore, having settled with the shipowners by paying an amount less than the full market value of the vessel's use during the period of detention, the petitioner became liable to the respondents. The Court added:

> "It is unnecessary to determine in the instant case whether the charterer's right to recover for his loss is direct against the wrongdoer, enforcible by a libel independent of that which the shipowner but for the release could have brought for his damages, or whether it is indirectly based upon the equitable obligation of the shipowner to the charterer, in analogy to the bailment and the Winkfield cases [1902] Prob. 42]; for no error is assigned because of the failure to join the shipowner as libellant pursuant to the practice adopted in the Sarastad case [206 Fed. 502]." (R. 41.)

In view of the fact that the libel alleged a breach of contract, and that the answer denied any contract with the respondents, and pleaded a release from the shipowners, it is difficult to understand when or how the petitioner had an opportunity to assign the error the learned court suggests.

But the Circuit Court of Appeals concluded:

> "Even if the right be derivative and equitable in its nature, the settlement made and the release accepted, as it was in this case with full knowledge of libellants' claim, could afford no defense in admiralty, the more so when, as here, neither party intended it to operate as a release of more than the owner's own personal damages." (R. 42.)

The Circuit Court of Appeals thus refrained from deciding that the petitioner's negligence rendered the petitioner directly liable to the respondents. Decision was apparently placed on the ground that in obtaining a release from the shipowners without paying as consideration therefor an amount equal to the full market value of the vessel's use for fourteen days, the petitioner participated in a breach of trust owing from the shipowners to the respondents, and so became liable in admiralty as for a tort.

Aside from the question whether admiralty could entertain a libel that alleged the existence of those facts, the first premise of the decision is not supportable.

The petitioner was not unconditionally liable to the shipowners for the full market value of the vessel's use for fourteen days.

In the first place, although the vessel was actually detained for an extra period of 14 days as a result of the necessity for casting a new propeller, the petitioner, as a contractor, was not unconditionally liable for that result, as a tortfeasor would have been. As a contractor, the petitioner was answerable to the shipowners for the ensuing detention only if such detention was reasonably to be apprehended as a probable result of the petitioner's breaking the propeller, at the time when the petitioner contracted to install it.

Hadley v. *Baxendale*, 29 Eng. L. & Eq. 398.
Howard v. *Stillwell*, 139 U. S. 199.
Weston v. *Boston & M. R. Co.*, 190 Mass. 298.

"The duty to refrain from a tort is a duty which no one can avoid; it is imposed upon him by the law, and no act of his can increase or diminish it. But in entering into a contract he is undertaking a duty which the law does not require of him; its assumption is purely voluntary, and fairness requires that he should be able to understand the extent of the obligation he undertakes. A just rule, therefore, would put upon a person who commits a tort the risk of all proximate consequences of his

wrong, but upon one who breaks a contract such risk as he could have foreseen when he undertook the duty; and this appears to be the conclusion of the law."

Sedgwick on Damages, 9th Ed., Volume 1, Sec. 141.

It has not been shown that either party to the contract by which the petitioner engaged to install the propeller contemplated that breaking the propeller would entail the detention of the ship beyond the expected period of repairs, or at any rate for a period of fourteen days beyond that period.

In the second place, even assuming that the shipowners might have had a cause of action against the petitioner for the entire detention, the petitioner had the right to compromise that claim upon such terms as the shipowners might agree to. This is not a case where the petitioner owed a definite sum of money to a trustee, and in bad faith settled with the trustee for less than the admitted debt. The petitioner, in carrying out a repair contract with the owners, had injured a ship; there is no evidence that at the time the settlement was made the petitioner would have paid one cent more than it did for a compromise settlement with the shipowners, no matter how large the damages that might have been recovered by the shipowners upon suit, or who would have been entitled to share the damages if and when the shipowners might have recovered them.

If, as the Court of Appeals seems to have considered, the petitioner was originally liable only to the shipowners, who were obligated to the charterers to collect and account for the latter's lost profits, it is difficult to see why the shipowners, rather than the petitioner, should not be answerable for the shipowners' so-called breach of duty. The petitioner was not obliged to do more than settle with the shipowners, the only persons with whom the petitioner had contracted, and the only persons who had any property interest in the injured ship, and the petitioner was not obliged to pay for a settlement any more than it actually paid. On settling with the shipowners the petitioner's liability was ended.

The basis upon which liability was imposed by the Circuit Court of Appeals is not cognizable by an admiralty court.

Even assuming that the propositions stated by the Circuit Court of Appeals be correct, and that the shipowners might have demanded and recovered from the petitioner an amount equal to the full market value of the vessel's use during the entire period of detention, and that the petitioner, through its participation in the settlement with the shipowners, rendered itself liable as a tortfeasor to the charterers, it seems clear that such liability to the charterers would not be enforceable in admiralty.

The petitioner owed the charterers no duty growing out of the repair contract, and by the clear weight of authority the petitioner was not answerable to the charterers for negligence resulting in injury to the latter's charterparty with the shipowners. The so-called tort as to the charterers seems to have consisted in the petitioner's obtaining a release from the shipowners without paying the full amount of the damages that the shipowners might possibly have recovered. Taking the petitioner's duty to be exactly what the Circuit Court of Appeals assumed that it was, a breach of that duty would not give rise to a cause of action within the jurisdiction of an admiralty court.

In *The Eclipse*, 135 U. S. 599, it was held that a court of admiralty had no jurisdiction of a suit by a majority of the equitable owners of a vessel to remove the master, who held legal title to a one-half interest in the vessel. The Court added:

> "While the court of admiralty exercises its jurisdiction upon equitable principles, it has not the characteristic powers of a court of equity. It cannot entertain a bill or libel for specific performance, or to correct a mistake. *Andrews v. Essex Fire Co.*, 3 Mason, 6, 16; or declare or enforce a trust or an equitable title. *Ward v. Thompson*, 22 How. 330; *The Amelia*, 6 Ben. 475, 12 Fed. Cas. No. 6487. Aff. 1 Fed. Cas. 275; *Kellum v. Emerson*,

2 Curtis 79 [14 Fed. Cas. 7669]; or exercise jurisdiction in matters of account merely * * *." (*The Eclipse*, 135 U. S. 599, at 608.)

In *Kellum* v. *Emerson*, 14 Fed. Cas. 7669, Mr. Justice Curtis said:

> "It is often said that a court of admiralty is a court of equity, acting on maritime affairs. This is true when properly understood. A court of admiralty applies the principles of equity to subjects within its jurisdiction. But that jurisdiction differs very widely from the jurisdiction of courts of chancery; and in my opinion embraces no case, where an equitable title, arising out of a trust, is the basis of the claim, and its subject matter is the proceeds of a sale wrongfully made, in violation of that trust."

Here the Circuit Court of Appeals seems to have recognized something less than an equitable title. Recognition has been given to what is at most a doubtful equitable interest in uncollected damages, and admiralty has been held to have jurisdiction of a suit to recover for an impairment of that interest.

It is submitted that the admiralty does not know such a cause of action. (Cf. *The Chauncey*, 264 Fed. 276, at pp. 284-5.)

The fact that the shipowners might in other circumstances have suffered the charterers' loss, does not prevent the latter's damages from being legally remote.

The Circuit Court of Appeals was moved by the consideration that the shipowners' loss through the detention of the vessel was much less than it would have been if the vessel had not been under charter for a relatively low rate of hire. The court therefore attempted to state the case, not in terms of the petitioner's duty to the charterers to refrain from negligently injuring the ship (there was no such duty), but in terms of the petitioner's so-called liability to pay full damages to

the shipowners. If rights and duties can be inverted in that fashion, liability for negligence becomes endless.

In almost every case in which a person or thing is injured, it is conceivable that the aggregate losses resulting from the injury, including the losses suffered by third persons in their contract relationships, might in other circumstances have fallen upon the person most immediately concerned.

For example, it might have been said in *The Federal No. 2* (21 F. (2d) 314) that the injured seaman's full damages would have included his hospital bill had it not been for the contract by which the unsuccessful libelant in that case was obliged to pay his hospital bill. In *Dale v. Grant*, 34 N. J. L. 142, the Dale Corporation, in the absence of its contract with the plaintiff, might have suffered and recovered for the loss that fell on the plaintiff. In *Milton v. Storey*, 11 Vermont 101, the pauper, had he been able to support himself, could have recovered from the defendant as a part of his own damages an amount equal to the plaintiff's loss. In *Taylor v. Neer*, 1 Esp. N. P. 386, the actor might have been his own manager, and recovered an amount equal to the manager's loss, as well as the damages he actually suffered. In *Cattle v. Stockton Waterworks*, 10 Q. B. D. 453, the landowner might have been digging the tunnel himself, and in that event the amount of loss suffered by the plaintiff would have been added to the landowner's damages.

Such instances might be multiplied. They suggest the futility of attempting to discard our present conception of legal liability in favor of a practice by which liability is made to depend upon the possibility that the loss in question might have been suffered by the person legally entitled to sue.

Where, according to this new conception of torts, would the petitioner's liability end? The petitioner has settled with the shipowners; the respondents insist that they must be settled with, too. How about the subcharterer who had contracted with the respondents for the use of the vessel for less than the market rate of hire at the time the accident happened, and who lost the difference between the hire they

would have paid the respondents and the hire they could have got from a second subcharterer? (R. 29). Is the petitioner liable also to the subcharterer and to the sub-subcharterer, and to shippers who had contracted with the latter for space on the vessel at a freight rate lower than the one they were subsequently obliged to pay? There would be no end to litigation if such were the case.

The law as laid down in *Winterbottom* v. *Wright*, 10 M. & W. 109, is stated in *Earl* v. *Lubbock*, 1 K. B. (1905), at page 255, as having settled the English law. Collins, M. R., says:

> "It would, in my opinion, be a waste of time to go through the numerous cases that have been cited, for the principles laid down by Lord Abinger, C. B., in the case that I have mentioned appear to me to be based upon sound reasoning, and to be conclusive in this case. The view taken by the Court is thus expressed by the Chief Baron at p. 114 of the report: 'Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue. Where a party becomes responsible to the public, by undertaking a public duty, he is liable, though the injury may have arisen from the negligence of his servant or agent. So, in cases of public nuisances, whether the act was done by the party as a servant, or in any other capacity, you are liable to an action at the suit of any person who suffers. Those, however, are cases where the real ground of the liability is the public duty, or the commission of a public nuisance. There is also a class of cases in which the law permits a contract to be turned into a tort; but unless there has been some public duty undertaken, or public nuisance committed, they are all cases in which an action might have been maintained under the contract. Thus, a carrier may be sued in assumpsit or case, but there is no instance in which a party who was not privy to the contract entered into with him can maintain any such action. The plaintiff in this case could not have brought an action on the contract; if he could have done so, what would have been his situation, supposing the Postmaster-General had re-

> leased the defendant." That would, at all events, have defeated his claim altogether. By permitting this action we should be working this injustice, that after the defendant had done everything to the satisfaction of his employer, and after all matters between them had been adjusted, and all accounts settled on the footing of their contract, we should subject them to be ripped open by this action of tort being brought against him. It seems to me that the principle there laid down is conclusive in the present case."

The decision of the Circuit Court of Appeals does not give proper consideration to the fact that the respondents had an opportunity to protect their profits either by making themselves parties to the repair contract, or by stipulating with the shipowners that the ship, when off hire to permit repairs, should be restored to service within a specified time. If either of those things had been done by the respondents, the court would not be urged to go beyond accepted principles of law to give the respondents a recovery. The so-called "hard case" that makes bad law would not be presented.

The Circuit Court of Appeals referred to the following cases as instances in which a charterer has recovered damages for injury to the chartered vessel:

The Beaver (C. C. A. 9th), 219 Fed. 139, where a charterer was allowed to recover for loss of *bill of lading freight* as well as for the value of certain personal property belonging to the charterer, lost as a result of the collision. It is respectfully pointed out that the Circuit Court of Appeals in the opinion below, fell into the same error that Judge Mayer had fallen into when he referred to the case in his opinion in *The Aquitania*, 270 Fed. 239. In the *Beaver* case the right of the charterer to recover damages for injury to the vessel was not involved. For all that appears in the reported opinion, and in the abstract of the record appended to Judge Mayer's opinion in *The Aquitania* (270 Fed., at

p. 245), the charterer in the *Beaver* case was the bailee of the cargo, and had a lien upon the cargo for freight. The charterer, as bailee of the cargo, was therefore entitled to recover the lost freight. There is no novelty in that result; it is entirely consistent with the proposition that a charterer not having possession cannot recover damages for injury to the chartered ship.

> "When a vessel is totally lost in the process of earning freight under a charter party, and in consequence the freight also which such vessel in all human probability would have earned, the owner is entitled to recover the amount of this freight. A charterer, or sub-charterer, however, who has for the time being the use of a ship not demised to him cannot recover for the loss of freight. His contractual relation with the owner or previous charterer gives him no such right against the wrongdoer. The owner recovers the value of his ship and the loss of freight under a charter, if the freight has not been paid. But the position of the charterer is different, he is governed by the leading case of *Simpson v. Thompson*, [(1877) L. R. 3 App. Cas. 279; *Societe Romanaise v. Bennetts*, (1911) 1 K. B. 243] which lays down the general rule that one who by contract with the owner of a chattel which is injured has secured advantages which are rendered less beneficial by the damage done has not thereby a right of action against the wrongdoer. *If, however, the charterer or sub-charterer has a right to freight under a bill of lading, signed by himself as principal, and on the facts in regard to such bill of lading is a bailee of the goods, he has thereby such a possession and interest in them as gives him a right to recover from the wrongdoer such amount of freight as can be proved to have been lost owing to the loss of cargo through the collision.* [*The Okehampton*, (1913) Prob. 173.]" (Italics are ours.)

Roscoe on Damages in Marine Collisions, 2nd Ed., pp. 41-42.

See also the remarks of Scrutton, L. J., in *Elliott Steam Tug Co. v. The Shipping Controller*, (1922) 1 K. B. at pp. 139-140.

The case of *The Binghampton* (reported only in C. C. A., 271 Fed. 69), which was decided by Judge Mayer in District Court, and was referred to by the Circuit Court of Appeals in the present case, was so modified on the merits by the Circuit Court of Appeals that the point being considered here was not involved.

Hines v. *Sangstad S. S. Co.* (C. C. A. 1st), 266 Fed. 502, was a case in which a joint libel had been filed by the owner and the charterer. The vessel had been on hire during the period of detention, and the damages for loss of use were apportioned between the charterer and the owner. There was no discussion of the point here involved.

The Aquitania (D. C. S. D. N. Y.), 270 Fed. 239, is apparently the only case, except the instant one, in which the present point has been considered. Judge Mayer held in that case that the charterer had a property interest in the vessel, a conclusion that is, of course, not supportable, and that has been rejected by the Circuit Court of Appeals below.

All of the cases above referred to were decided before this Court rendered its decision in the case of *Osaka Shosen Kaisha* v. *Lumber Co.*, 260 U. S. 490. Before that decision was rendered it had been assumed by some of the lower courts that a charterer, under a charterparty in the form of the present one, had something in the nature of a proprietary interest in the chartered vessel as security for the performance of a charterparty actually entered upon. As an illustration, the Circuit Court of Appeals entertained without comment on the point a suit in rem by the present charterers against this vessel to recover damages for the shipowners' alleged failure to keep the vessel in repair (*The Bjornefjord*, 271 Fed. 682).

POINT V.

The injury to the ship occurred while the vessel lay in a graving dock, and a suit to recover damages for that injury is outside admiralty jurisdiction.

There is no evidence in the record that this vessel was within the jurisdiction of admiralty when she was injured. The libel alleges a cause of action in contract (R 2), and that the premises of the libel are within the admiralty and maritime jurisdiction of the United States (R 3). The answer admits the admiralty and maritime jurisdiction (R 4); that is, it is admitted that admiralty has jurisdiction of the suit upon the repair contract alleged in the libel. Even a specific admission of jurisdiction in tort would not, of course, have the effect of giving the court jurisdiction if the cause of action arose on land.

It is admitted, however, that the vessel was injured while in a graving dock, which was correctly described in the opinion of the District Judge as a "structure permanently resting on the shore, made by dredging and the building of a cofferdam, after the ship is floated into the dock the gates are closed and the water pumped out" (R 23). (See Century Dictionary, Vol. 3, under "Dock".)

The Circuit Court of Appeals dealt with the question of its jurisdiction in tort as follows:

> "As to a liability in tort, we are met at the threshold with an objection to the jurisdiction of a court of admiralty, based on the contention that the tort, if any, having been committed while the ship was in drydock, was not 'committed and effective on navigable waters' (*Gonsalves v. Morse Dry-dock & Repair Co.*, 266 U. S. 171, 172). We feel ourselves however, concluded as to this contention by *The Jefferson*, 215 U. S. 130, and *The Robert W. Parsons*, 191 U. S. 17" (R 69).

It is submitted that in the case of *Great Lakes Dredge & Dock Company* v. *Kierepewski*, 261 U. S. 479, 480, and in *Gonsalves* v. *Morse Drydock & Repair Co.*, 266 U. S. 171, 172, this Court has made quite clear that at no time has this Court intended to authorize a departure from the old and familiar doctrine that in contract matters admiralty jurisdiction depends upon the nature of the transaction, and that in tort matters it depends upon the locality where the tort is committed; that is to say, if the tort has been consummated on navigable waters, the Court has jurisdiction, otherwise not.

The Jefferson, *supra*, decided merely that a ship may none the less be the subject of a salvage service when she is on drydock and in danger of being destroyed by fire originating on land. It is evident that the Court considered salvage as growing out of, or analagous to, implied contract, and therefore considered that it was immaterial that the vessel was on land at the time; the jurisdiction of the Court in matters of contract and salvage being not dependent upon locality, but merely upon the maritime character of the transaction.

The Robert W. Parsons, *supra*, decided only that an admiralty court has jurisdiction of a contract for the repair of a vessel, no matter where the ship may lie when the repairs are made. It is submitted that the language used by this Court in that case is not applicable to a case of tort and that the later cases of this Court above referred to indicate that this Court has at no time held that a tort committed upon a vessel while resting in an innavigable drydock is within the admiralty jurisdiction.

Hughes on Admiralty, 2nd Ed., p. 196, note 5.

Conclusion.

It is submitted that the libelants below have established no cause of action against the petitioner, and that the decrees below should be reversed and the cause remanded, with directions to dismiss the libel.

Respectfully,

JAMES K. SYMMERS,
JOHN C. CRAWLEY,
for the Petitioner.

Office Supreme [illegible]
FILED
SEP 10 1926
WM. R. STANSBU
CLE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. [redacted] 102

GEORGE FLINT, SAMUEL W. COLLINS and LUDWIG T. BREHM, doing business under the name of FLINT GOERING & CO., LTD., a limited partnership
Libellants Appellees

AGAINST

ROBINS DRY DOCK & REPAIR COMPANY
Respondent Appellant

MEMORANDUM FOR GEORGE FLINT ET AL. IN OPPOSITION TO PETITION FOR CERTIORARI

The petition does not disclose any sufficient grounds for granting certiorari.

The only novelty in this case is scarcely one of law, but is incidental to the high market value which time charters of steamers reached during the war period. The result of that circumstance was that time charterers of steamers under pre-war charters (as the libellants-appellees were) had heavy claims for deprivation of use, which under pre-war conditions would not have existed. So long as the value of use of a vessel to a time charterer did not greatly exceed the hire payable by him to the owner, claims for deprivation

of use were small, and there was much less temptation to contest them than where, as here, the loss to the charterer was substantial.

The decisions of the District Court and Circuit Court of Appeals are correct on the merits. They only gave libellants what the petitioner caused them to lose, which was the clearly ascertained and non-speculative value of their right of use of the vessel under their charter for two weeks, a contrary result would have been harshly unjust and could have been reached only by straining technical rules.

Negligence of the petitioner which caused the detention of the *Beresford* was expressly admitted in Article V of its answer to the libel (Rec. p. 7).

Before the petitioner severed from the owner the release of December 7, 1917, which it pleaded (Arts. XI-XII of Ans.) to defeat the libellants' claim the petitioner was fully advised of their claim by their letter of August 10, 1917 (Rec. p. 17). The consideration which the petitioner paid the owner for the release was the comparatively small amount of hire which the owner lost by the detention, that being only a small portion of the market value of use of the *Beresford* during the period of detention. The petitioner conceded below that the owner's representative when settling with the petitioner did not put forward or pretend to be settling the libellants' claim which was for such portion of the market value of use of the *Beresford* as exceeded the hire receivable by the owner, to which the libellants as time charterers were entitled for their own benefit.

The question before the lower courts therefore was whether the petitioner could take advantage of the charter situation to deprive the libellants of their share of the market value of use of the *Beresford*.

Reference to general decisions could not assist greatly in settlement of this question. The rights of the libellants under the time charter of July 13, 1913 (Rec. p. 25) were peculiar and not merely such as might exist under ordinary agreements for personal service. That charter gave the libellants exclusive use of the steamer for five years for carrying lawful merchandise according to their directions. By clause 8 they had the disposal of the whole reach of her holds, decks and usual places of loading and accommodation. By clause 9 the captain was under their orders and direction and the libellants by the same clause agreed to bear all liabilities arising from the captain signing or complying with bills of lading. By clause 11 they had permission to appoint a supercargo. By clause 19 they had a lien on the ship for all moneys paid in advance and not earned. By clause 1 the owner agreed to maintain the steamer in a thoroughly efficient state; and by clause 22 further agreed to dock the steamer whenever libellants as charterers and the master might think necessary, and at least once in every six months, and the steamer was put on petitioner's drydock solely for the purpose of complying with those obligations. They were being discharged by the petitioner as an independent contractor for the direct benefit of the libellants. The steamer was not in any sense withdrawn from the charter, but remained under it with payment of hire temporarily suspended.

Although the charter was not technically a demise, the libellants had qualified possession of the steamer, as evidenced by the use in clauses 1 and 5 of the expression "delivery" and "return delivery" (i. e. by owner to charterer and the reverse). Their relation to the vessel was such that they were the carriers of all cargoes which she might transport

See *The Centurion*, 37 Fed Rep 812; *Olsen v United States Shipping Co*, 213 Fed Rep 19. They had what Judge Hough aptly described in *The Santanna*, 152 Fed Rep 516, 518, as "an estate carved out of the ship". To put it another way, they had an interest rather like that of the lessee of real property.

The decisions of the courts below do not stand by themselves. The same result had been previously reached by Judge Mayer after full consideration in *The Iquitenia*, 270 Fed Rep 239, which involved a much larger sum and which held the time charterer of the *Lord Dufferin* entitled to recover its loss, value of the use of that steamer, resulting from her running down in New York harbor by the *Iquitenia*. The Circuit Court of Appeals for the Ninth Circuit followed the same principle in *The Bonner*, 279 Fed Rep 134. An analogous decision was made by the Circuit Court of Appeals for the Seventh Circuit in *Great Lakes etc. Transportation Co v Scranton Coal Co*, 229 Fed Rep 601, where the Court affirmed an order of the District Court which restrained the owner from selling steamers which it had chartered. The Court intimated that specific performance of the charters might be granted.

So far back as 1882 Judge Addison Brown held in *The General Republic*, 10 Fed Rep 795, that the mortgagee of a vessel having neither ownership nor possession was entitled to sue for collision damages. See also *Hines v Mansfield & A Co*, 206 Fed Rep 502; *The Vreland*, 1927 A M C 1141. These several decisions as well as that in the case at bar are all in accord with the principle laid down by this Court that in admiralty cases the real party in interest should institute suit in his own name. *Peet v Roth*, 12 How 468, 469. The petitioner did not assign error to the point

that the owner of the *Bjornefjord* was not made a party libellant, and any such objection now is out of order. *The Commander in Chief*, 1 Wall. 43, 52-53.

Recovery for loss of use of chattels is sustained by all the authorities with scarcely any dissent. See Harvard Law Review for April, 1926, at page 760. The English case of *The Susquehanna*, which the petitioner cites, is not in conflict because there it was established that the ship would not have been chartered. Here the *Bjornefjord* was already under a charter and her market value for the period of loss of use was definitely ascertained.

The objection to jurisdiction made by the petitioner is without merit. This Court denied certiorari (242 U. S. 636) in *The Anglo Patagonian*, 235 Fed. Rep. 92, where the accident happened in a dry dock at Newport News of the same type as that here involved. The petitioner's answer to the libel expressly admitted the jurisdiction (Art. VI, Rec. p. 7).

The petition should be denied.

Respectfully submitted,

H. Alan Dawson
Roscoe H. Hupper
William J. Dean
Counsel for George Flint, *et al*
Libellants-Appellees

September, 1926.

FILED
NOV 25 1927
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 182

ROBINS DRY DOCK & REPAIR COMPANY

Petitioner

against

GEORGE FLINT, SAMUEL W. COLLINS AND LUDWIG T. BRIHM, Etc.

Respondents

BRIEF FOR RESPONDENTS

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

---

H. ALAN DAWSON
BURLINGHAM, VEEDER, MASTEN & FEAREY
Proctors for Respondents

ROSCOE H. HUPPER
H. ALAN DAWSON
WILLIAM J. DEAN
of Counsel

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 102

ROBINS DRY DOCK & REPAIR COMPANY
Petitioner

AGAINST

GEORGE FLINT, SAMUEL W. COLLINS and LUDWIG T. BREHM, etc
Respondents

BRIEF FOR RESPONDENTS

Mack, C. J., writing the opinion of the Circuit Court of Appeals, said (R. 40-41):

"Clearly, the result reached involves no injustice to respondent. Its liability for its tortious act is the actual damage done to the combined interests in the ship. The measure of the total recovery is the market value of the loss of the use. If there had been no charter, the entire loss would have been sustained by the owner; therefore he could have recovered that amount for himself. The wrongdoer has no interest in and should not benefit because of the contractual obligations of the shipowner to the charterer or the absence of any liability of the owner to the charterer for respondent's negligence. This non-liability of the owner is neither a test nor a measure of the wrongdoer's liability, for though the owner be not directly liable to the charterer, he may nevertheless be liable over to him as a trustee for so much of the recovery from the wrongdoer as exceeds his own personal loss."

The petitioner, at page 18 of its brief, states:

"Decision was apparently placed on the ground that in obtaining a release from the shipowners without paying as consideration therefor an amount equal to the full market value of the vessel's use for fourteen days, the petitioner participated in a breach of trust owing from the shipowners to the respondents, and so became liable in admiralty as for a tort."

And again at page 20 the petitioner's brief states:

"The so-called tort as to the charterers seems to have consisted in the petitioner's obtaining a release from the shipowners without paying the full amount of the damages that the shipowners might possibly have recovered."

The petitioner thus misconceives the basis of the decision of the Circuit Court of Appeals. The decision cannot fairly be said to suggest that the shipowner was guilty of breach of trust or that the petitioner participated in a breach of trust. The decision does suggest that if the shipowner had collected from the petitioner the full market value of the steamer's use during the period of detention, then the owner would have been bound to turn over to the charterers (respondents-libellants) so much of the same as exceeded what the charterers would have been bound under the charter to pay the owner for the use of the steamer during such period of detention—except for the negligence of the petitioner which prevented use.

Since the owner did not collect, as it might have done, the full market value from the petitioner, the decision of the Circuit Court of Appeals was to the effect that the charterers could enforce directly the cause of action which the owner in the nature of a trustee might have chosen to enforce for their benefit. The owner, instead of enforcing the cause of action for the full amount and then distributing to the char-

terers (respondents) their proper share, chose to accept from the petitioner against a release only the amount which it was entitled to retain for itself. This release did not purport to cover or discharge any claim or portion of the claim to which the charterers might be entitled (R. 18, 38). Indeed, had it pretended to cover more than the owner's share it would have been ineffective, because a release without consent of the beneficiary is not valid. *See Perry on Trusts*, 5th Ed., Sec. 520; *McClurg v. Watson*, 13 Penn. St. 439.

The only effect of the owner's release was to remove from the case that portion of the damage to which the owner was itself entitled, and the cause of action for damage so far as the charterers were interested therein, *i. e.*, the chose in action which existed for their benefit, persisted until they should receive satisfaction, irrespective of whether the owner should enforce that chose in action and turn the proceeds over to them, or whether they should themselves enforce the chose in action, which by virtue of the charter came to them on the shipowner.

Since admiralty favors suit by the real party in interest, *Frets v. Bull*, 12 How. 466, 468, there can be no objection to the charterers suing in their own name or to the owner not being joined as a party libellant. Joinder of the owner would have been pure ceremony, as the owner no longer had any interest for itself, and the charterers were not asserting any claim against the owner.

No point was made in the assignments of error that the owner had not been made a party. Such suggestion of error is not admissible now. *The Commander-in-Chief*, 1 Wall. 43, 52-53. The point was not raised in the answer, which would have been the proper practice. *Fairgrieve v. Marine Ins. Co.*, 94 Fed. 686, 687.

The misconception of the basis of decision of the Circuit Court of Appeals is emphasized by the final paragraph of the petitioner's analysis at page 17 of its brief

"4. Therefore, having settled with the shipowners by paying an amount less than the full market value of the vessel's use during the period of detention, the petitioner became liable to the respondents."

This quotation hardly allows to the Circuit Court of Appeals the weight to which its reasoning appears entitled. It was not because the petitioner had paid to the owner less than the full market value of the vessel's use that the petitioner was held liable to the respondents. The petitioner's payment to the owner had nothing whatever to do with arising of its liability. That liability existed to the fullest extent from the moment of the negligent act. The owner settled with the petitioner for that portion of the damage which belonged to the owner, leaving that portion which belonged to the charterers still outstanding. All that the Circuit Court of Appeals held, we repeat, was that the charterers as the real parties in interest were entitled to enforce the chose in action which existed for their benefit—which could have been enforced by the owner, which would then have been under the duty to turn over the proceeds to the respondents. What might have happened if the suit had been brought by the owner and the owner had refused to turn over to the charterers their proper share of the recovery is not in issue in this suit. This is in no respect a suit for breach of trust; it is a suit to enforce a chose in action for detention damages caused by the petitioner's negligence, not for physical damage to the ship.

This foundation of liability applied by the Circuit Court of Appeals is by no means novel, but is well supported by

decisions of this Court in analogous cases. We refer to those cases where underwriters are allowed to recover in their own name for damages caused to the insured. In *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 462, this Court said:

"From the very nature of the contract of insurance as a contract of indemnity, the insurer, upon paying to the assured the amount of a loss, total or partial, of the goods insured, becomes, without any formal assignment, or any express stipulation to that effect in the policy, subrogated in a corresponding amount to the assured's right of action against the carrier or other person responsible for the loss; and in a court of admiralty may assert in his own name that right of the shipper. *The Potomac*, 105 U. S. 630, 634; *Phenix Ins. Co.* v. *Erie Transportation Co.*, 117 U. S. 312, 321.

"In the present case, the libellant, before the filing of the libel, paid to each of the shippers the greater part of his insurance, and thereby became entitled to recover so much, at least, from the carrier."

See also *The Potomac*, 105 U. S. 630, 634. In *The Propeller Montello* v. *Wallison*, 17 How. 152, 155, this Court said:

"It is true, that in courts of common law the injured party alone can sue for a trespass, as the damages are not legally assignable; and if there be an equitable claimant, he can sue only in the name of the injured party; whereas, in admiralty, the person equitably entitled may sue in his own name. But the same reasons by [which] the wrongdoer cannot be allowed to set up as a defence the equities between the insurer and insured, equally apply in both courts. The respondent is not presumed to know, or bound to inquire, as to the relative equities of parties claiming the damages. He is bound to make satisfaction for the injury he has done. When he has once made it to the injured party, he cannot be made liable to another suit, at the instance of any merely equitable claimant. If notified of such a claim before payment, he may compel the claimants to interplead; otherwise, in making reparation for a wrong done, he need look no further than to the party injured. If others claim a right to stand in his place, they must intervene in proper time, or lose their recourse to the respondent."

In cases where the interest of the underwriter is less than the total loss to be sued for, joinder of the owner is required, since the owner in such case has an interest in enforcing the claim, which is partly for his account. But if the owner's interest has been released the underwriter may maintain his suit for the amount of his interest, as to which see *Fairbanks v. Metcoa Ins. Co.*, 94 Fed. 686, 688, where the Circuit Court of Appeals for the Eighth Circuit said:

"It will be open to the libellant, when the record is returned to the District Court, to amend its libel, and show, if it can, that the excess of damages over the sum for which it sues has been paid, released, or otherwise extinguished, so that the claimants are no longer liable to an action therefor at the suit of anyone."

The interest of the respondents in the detention damage was of a rank and character no less than the interest of an underwriter in physical damage. The underwriter secures his interest by the contract of insurance, the charterer secures his interest by the charter party, which gives to him the exclusive use and direction of the ship and all her earning power.

If the respondents had participated with the petitioner in a tort with respect to the vessel and her use and been held liable therefor, they could have enforced contribution from the petitioner for the damage. *Erie Railroad Co. v. Erie Transportation Co.*, 204 U. S. 220, 235; *The Ira M. Hedges*, 218 U. S. 264, 270-271. See also *Geerts v. Fuller Co. v. Otis Elevator Co.*, 245 U. S. 489. Being innocent sufferers from the petitioner's negligence and not participants therein, why should the respondents have the principle of contribution enforced against them?"

FIRST POINT

THE DAMAGES ARE NOT SPECULATIVE OR REMOTE, BUT WERE LIMITED TO THE RESPONDENTS' SHARE OF THE MARKET VALUE OF THE USE OF THE STEAMER.

In *The Potomac*, 105 U. S. 630, 631 632, this Court said:

"* * * the owners of the injured vessel are entitled to recover for the loss of her use, while laid up for repairs. When there is a market price for such use, that price is the test of the sum to be recovered."

In *The Conqueror*, 166 U. S. 110, 127, this Court said:

"The best evidence of damage suffered by detention is the sum for which vessels of the same size and class can be chartered in the market."

See also *Sedgwick on Damages*, 9th Ed., Sec. 593.

The authorities are collected in 39 Harv. L. Rev. 760 762, wherein is pointed out the difference between the "objective" value and "subjective" value theories of damage arising from loss of use of a vessel. The rule of objective value is enforced in this country, and has been at times in England until the decision in *The Susquehanna*, 134 L. T. R. 45, which petitioner mentioned in its application for certiorari (p. 5).

Although that decision is not in accord with the law of this country on similar facts, nevertheless, if it could have been shown in that case that the plaintiff would have chartered the vessel, recovery could have been had on the basis of market value, just as in a similar case in this country. The *Ryanefjord* was already chartered when the detention occurred.

The market value of the use of the steamer during the detention caused by the petitioner's negligence is a fair and certain basis of damages. Assuming for argument that the charter hire collectible by the owner from the respondents had been higher than the market rate prevailing at the time of detention, it goes without saying that the petitioner would not have been liable to the owner in excess of the market value unless the charter rate had been specifically brought to the petitioner's attention and made the basis of special damages. It cannot make any difference in principle that the market value happened to be higher than the owner's charter rate. It was still the market value and not the charter rate which should be taken as the measure of damage, irrespective of whether the claim is considered to be in contract or in tort. The petitioner has never claimed that it undertook the work on the steamer in contemplation of the charter or that it had any notice of the same until after the accident. On page 2 of its brief it is stated:

"The petitioner had no notice of the respondent's charter party until after the accident."

Detention damage is recoverable as the proximate result of incapacitating a steamer by negligent workmanship quite as much as by a collision, and the true measure thereof is the market value of the loss of use. In 1917 such market value was high because of the extraordinary demand for steamers, a fact which was then well known to the general public and undoubtedly also to the petitioner as well as all others who had anything to do with the shipping business.

The negligence of the petitioner was expressly admitted in the answer (R. 4). No error was assigned to the amount of the damage. By making payment to the owner the petitioner recognized its liability at least to the extent of the

owner's share in the market value of the use (limited by the charter). There is no more reason for contending that the charterer's share of the market value is remote damage than so to contend with respect to the owner's share thereof.

The suggestion at page 24 of the petitioner's brief that the respondents might have made themselves parties to the repair contract or stipulated with the owner that the ship should be restored to service within a specified time merely begs the question. It is true enough that if the respondents had protected themselves in some other way (had that been possible or practical) they might not have been obliged to sue the petitioner; that does not mean that the petitioner's total liability for negligence would have been any less. Nor does this suggestion support petitioner's contention that the damages were remote.

SECOND POINT

THE DECISION OF THE CIRCUIT COURT OF APPEALS WAS CORRECT AND IN ACCORD WITH ESTABLISHED PRINCIPLES.

Judge Mack's opinion shows that no injustice was done the petitioner, because it was not held liable to pay *in toto* more than it could have been required by the owner to have paid in the first instance, in accord with the authorities we have mentioned. So far from any injustice to the petitioner being intended or possible, there would be serious injustice to the respondents if recovery were denied.

The decision of the Circuit Court of Appeals was discussed and approved in 40 Harv. L. Rev. 302-305 (Dec. 1926).

The petitioner was advised of the respondents' claim at least by August 10, 1917 (R. 16) and made the payment to

the owner in December (R. 18), then withholding from the owner (it is fair to assume on account of the respondents' notice) all damages which exceeded the owner's interest.

The respondents sought to recover their loss from the owner of the steamer but in this were not successful, liability being denied on the ground that the owner performed its full duty under the charter by selecting a repair yard of good repute. *The Ripmeford*, 271 Fed. 682.

In *Hines* v. *Sungstad Steamship Company*, 206 Fed. 502, a time charterer was allowed by the Circuit Court of Appeals for the First Circuit to recover damage sustained by it for loss of use of the vessel, through damage to the vessel's mast caused by the negligence of a third party. The amount of the damage was the amount of hire which the charterer had been obliged to pay to the owner during the period of loss of use of the ship, the situation not being such as to result in cessation of hire under the breakdown clause. It does not appear that the charterer had any damages beyond this amount, but if there had been such the principle on which recovery was allowed would have given the time charterer damages for the loss of use of the vessel of the same nature as were allowed in this case.

In *Dominion Coal Co., Ltd.* v. *Waskinonge S. S. Co., Ltd.* [1922] 2 K. B. 132, it was held that requisition charter hire was apportionable between owner and time charterer.

In *The Winkfield* [1902] P. 42, the Court of Appeal allowed the Postmaster General to recover the full value of mail which had been destroyed by a negligently colliding ship, and this notwithstanding that the Postmaster General was not liable to the owners of the mail for the loss, although it was recognized that his recovery from the *Winkfield* was held by him as trustee for the owners.

THIRD POINT

THE RELATION OF THE RESPONDENTS TO THE BJORNEFJORD WAS SUCH AS TO SUPPORT RECOVERY OF DAMAGES BASED ON THEIR LOSS OF USE DURING THE PERIOD OF DETENTION CAUSED BY THE PETITIONER'S NEGLIGENCE.

Although the theory and reasons of the Circuit Court of Appeals seem sufficient to support its decision, it is nevertheless proper to put before this Court other considerations to support the result reached by the decision.

The petitioner makes the point that as the respondents had no property in the vessel they had no right to maintain suit for damage. This might be true with respect to physical damage but it cannot apply to damage for detention, i. e., loss of use, to which the respondents were solely entitled under the charter. For this use they were to pay the charter price. The respondents' five year time charter was "property", intangible though it might be, as distinguished from the physical property about which the petitioner argues. A portion of such property was admittedly destroyed by the detention which the petitioner's negligence caused. The contract for use of a vessel is property just as is a contract for construction, *Brooks Scanlon Corp. v. United States*, 265 U. S. 106.

The respondents had an interest in the vessel and the extent thereof is apparent from the time charter itself. That charter, dated September 13, 1913, (Ex. 1, R. 14) hired the steamship to the respondents for a period of five years, the steamer to be placed at their disposal at a United States port north of Hatteras, to be employed in carrying lawful merchandise, as they might direct. They were required (Clause 2) to provide

and pay for all coal, port charges, pilotages, agencies, commissions, consular charges, and all other charges except those provided to be paid by the owners, and the owners undertook (Clause 1) to maintain the vessel in a thoroughly efficient state in hull and machinery for and during the service. The respondents agreed to pay for the use and hire of the vessel £1,200 sterling per calendar month (Clause 4). Cargoes were to be laden and discharged in any dock or at any wharf or place that they should direct, and they were to have the disposal of the whole reach of the vessel's holds, decks and usual places of loading and accommodation (Clauses 7, 8). By Clause 9 it was provided that the captain was under the orders and direction of the respondents as regards employment, agency or other arrangements, and they agreed to indemnify the owners from all consequences or liabilities that might arise from the captain signing bills of lading. The owners undertook by Clause 10 to make a change in the appointments in case the respondents should have reason to be dissatisfied with the conduct of the captain, officers or engineers. They had permission to appoint a supercargo (Clause 11). By Clause 19 they were expressly given a lien on the ship for all moneys paid in advance and not earned. The time charterer's operations as receiver of cargo can also subject the ship to liens. *The Capitaine Faure*, 10 Fed. 2nd, 950, certiorari denied, 271 U. S. 684.

These several detailed provisions, among others, show that the respondents had the absolute direction and control of the vessel during the entire charter period, which direction and control could hardly have been more absolute even if the vessel had been delivered into their actual physical custody. The relation was such as to make them the carriers of such cargoes as should be loaded on the vessel. *The Centurion*,

57 Fed. 412; *Olsen* v. *United States Shipping Co.*, 213 Fed. 18. They had what was aptly described by Judge Hough in *The Santona* as "an estate carved out of the ship and handed over for a specific term to the charterer, and that estate consists of the capacity of the vessel for carrying freight and earning freight moneys, and the use of the vessel, master, and crew, for the advancement of the charterers' gains." 152 Fed. 516, 518.

Judge Hough's language in *The Santona* is in no wise limited by his remarks in *The Saturnus*, 250 Fed. Rep. 407, which was not a case of a charter at all (or if so only for a voyage), where it was held that there was no maritime lien on the vessel with respect to refusal to load certain cargo at a certain place, even after the cargo was later received on board. This was the view also set forth in the *Osaka* case, 260 U. S. 490, which involved a voyage charter and not a time charter. The question here does not involve maritime liens resulting from union of ship and cargo, which were the sole points at issue in the *Osaka* and *Saturnus* cases. It is apparent from the discussion of long decided cases on pages 497 499 of the *Osaka* decision that no new point was therein decided by this Court.

It is not necessary in this case to enter upon all the niceties of maritime liens, for as between the respondents and the petitioner the question is purely collateral. Whether the libellants had a strict maritime lien or not, their position was at least analogous to that of a mortgagee and a mortgagee having neither ownership nor possession was held entitled by Judge Addison Brown to sue for collision damages. *The Grand Republic*, 10 Fed. 398.

The time charterer's relation to the vessel is such that equity will interfere by requiring specific performance, or at

least enjoining acts which would prevent performance of a charter. In *Great Lakes & St. Lawrence Transp. Co. v. Scranton Coal Co.*, 239 Fed. 603, Mack, *C. J.*, sitting in the Circuit Court of Appeals for the Seventh Circuit, affirmed an injunction order restraining the sale of nine steamers which had been chartered to transport coal on the Great Lakes in 1916, 1917 and 1918, and intimated that specific performance of the charter would be granted on proof of certain facts (pp. 608-610). The vessels were referred to as "these specific, and under the then and now prevailing conditions, unique chattels". The conditions referred to by Judge Mack were those arising out of the war, which made any vessel, practically speaking, "unique" property. In that sense also the *Bjornefjord* was "unique" at the time of her detention in August, 1917, and had her owner refused to continue performance of the charter most likely specific performance could have been enforced. See *Lord Strathcona SS. Co. v. Dominion Coal Co., Ltd.* [1926] A. C. 108, where the charter was considered by the Privy Council to be a servitude.

It is not seen that the question as to specific performance of a charter differs from that of a contract of sale. Such a question with respect to sale was determined by Judge Hough in the District Court, in *American Union Line, Inc. v. McIntyre Lumber & Export Co.*, (unreported) Equity 15-90, April 17, 1918, in which he said:

"The nature of the action, as I conceive it, is a bill for the specific performance of a contract for the sale of a vessel, and this I regard as an established, though small, subhead of Equity jurisprudence. If I had any doubt on this point of jurisdiction it would be entirely resolved in favor of the right to bring the suit, by the notorious conditions of today, which make ships capable of deep water traffic quite as peculiar and unique as some of the heirlooms which are usually referred to when considering this branch of equitable jurisdiction."

See also *Behnke* v. *Bede Shipping Co., Ltd.*, 32 Com. Cas. 134, 143; *Williston on Sales*, 2d Ed. Sec. 602; *Menier* v. *Donald*, 98 Misc. 684, and authorities discussed in L. R. A. 1918 E. 621.

The charterer has such interest in the use and employment of the vessel that he can secure marine insurance against loss of charter hire and profits under the charter, Arnould on Marine Insurance, 11th Ed., Sec. 262, Note (*m*), and even under a voyage charter the charterer has been held to have an insurable interest. *South American Shipping Co* v. *Importers & Exporters Ins. Co.*, 9 Fed. 2nd 304.

In *Elliott Steamtug Company, Ltd.* v. *The Shipping Controller* [1922] 1 K. B. 127, which petitioner cites (pp. 13 14), Scrutton, *L. J.*, was of opinion that the charterer's loss was direct and he recognized the propriety of apportionment between owner and charterer (142).

FOURTH POINT

MANY DECISIONS HAVE ALLOWED RECOVERY BY A TIME CHARTERER WITHOUT BASING THE SAME ON DERIVATIVE RIGHT THROUGH THE OWNER.

The several decisions which we shall now cite reached the same result as did the Circuit Court of Appeals, but on different grounds. The most recent of those decisions was *The Aquitania*, 270 Fed. 239 (D. C. So. D. N. Y.), which involved a collision in New York Harbor February 28, 1919, between the *Aquitania* and the *Lord Dufferin*, the latter vessel being then under time charter for a period of five years to Gaston, Williams & Wigmore Steamship Corporation. Said time charterer sued for the damages caused to it by the

collision which were claimed to amount to $1,000,000. The question was fully dealt with by Judge Mayer in a careful opinion in the course of which he stated (240 241):

"The consideration of the question involved starts with the impetus that the aim of the admiralty courts is to work out principles which make for justice and seek to avoid the turning away of a suitor without remedy.

"An owner, possessing the full estate in a vessel, can, of course, recover for the loss of use of his vessel, damaged in a collision by the fault of another. The question is, whether, when an owner for a consideration has parted with the use of his vessel to a time charterer, the fact will justify a full release to the claimant of the damages sustained for loss of use of the vessel. The damages are the same, and thus the inquiry is whether the legal position of the time charterer is such as to debar the recovery sought.

"There are four cases in which recovery has been had by the time charterer under circumstances which can be justified only on the theory pressed by libellant in the case at bar. In these cases, however, the question here involved is not precisely discussed, as will appear *infra*."

Judge Mayer then referred to several decisions of other courts, among which were *The Beaver*, 219 Fed. 134, where the time charterer of the *Selja* was allowed by the Circuit Court of Appeals for the Ninth Circuit to recover from the *Beaver*, which had collided with the *Selja*, for loss of bill of lading freight and physical property on the *Selja*. He also cited *Hines* v. *Sangstad Steamship Company*, 266 Fed. 502, the facts of which are stated *supra*, page 10.

After analyzing the decisions referred to, Judge Mayer continued (270 Fed. at 244):

"This brings us to the principle which must be applied or rejected, and that is whether the capacity of the vessel for earning freight and freight moneys, and the use of the vessel, master and crew to that end, constitute property. It is urged that it does not principally, because under this form of charter there is no demise. But a demise carries with it

control of the vessel for all purposes. It makes the demisee (i. e., charterer, where there is a demise) the owner *pro hac vice*.

"But there is no inconsistency nor illogical proposition involved in a holding that, under a charter such as this, while in respect of navigation and care the ship is the owner's, nevertheless, in so far as its capacity to earn freight is concerned, it is the charterer's."

He also quoted from Judge Hough's decision in the *Santona*, 152 Fed. 516, 518.

The petitioner sought in the court below to distinguish the *Aquitania* decision on the ground that the damage to the *Lord Dufferin* was sustained while she was in service under the charter and that the damage to the *Bjornefjord* happened while she was out of service. Such ground of distinction is immaterial as the *Bjornefjord* remained constantly under the charter and the period she was out of service was a part of the five year term. The charterer was merely excused by Clause 22 from paying hire during the time the ship was in dry dock and not rendering service to the charterer. In all other respects the charter remained in full force and the duty of the owner thereunder remained as effective as if the ship had been continuously in operation.

The petitioner is in error in claiming that the steamer was "withdrawn". The owner's only right of withdrawal was for the respondents' failure to pay hire (clauses 6 and 29). Neither the drydocking clause (22) nor the breakdown clause (16) allowed withdrawal. They merely provided for suspension or cessation of hire.

The time charterer's right has also been upheld by the Mixed Claims Commission between the United States and Germany, with respect to vessels sunk by submarines. In the case of the *Vinland* a decision was rendered by Umpire Parker holding that the American charterer of a destroyed

vessel was entitled to an award to the extent of its interest in the reasonable market value of the vessel at the time of destruction. The decision is well considered and clean cut. The Umpire said (Mixed Claims Commission, Administrative Decision No. VII, pp. 335-337):

"Likewise, as between the owner and the charterer the terms of the particular charter are important in determining the basis of apportionment between them of the amount of damage for which a third party is liable. But this apportionment does not affect the aggregate amount of such third party's obligation when established under appropriate rules for measuring damages applicable to cases where vessels are injured but not destroyed. On the whole, the rules sought to be evolved from these cases and applied to claims put forward on behalf of charterers of destroyed vessels are not particularly helpful in determining whether such claims fall within or without the terms of the Treaty of Berlin, or in measuring the claimant's recoverable damage, if any, under that Treaty.

"As applied to the loss of tonnage the tangible things destroyed are ships. The value of their use at the time and under the conditions then existing has been taken into account by this Commission as a factor in determining the market value of tonnage lost. Where, under the terms of a then existing charter party, the charterer was at the time of the loss entitled to the use of the ship on terms which would have had the effect of reducing the price which the owner could have obtained for it *if sold burdened with the charter*, then at the time of the loss the charterer had a pecuniary interest in that particular ship, a *jus in re*, a property interest or property right the subject matter of which was the ship, an interest entering into and inhering in the ship itself. Such a right and interest is an encumbrance on the ship in the sense of constituting a limitation on the owner's right to possess, control, and use it and as affecting the price at which it could be disposed of in the market burdened with the charter. It is an interest in the subject matter which the municipal courts will protect against both the owner and those claiming under him with notice thereof. In cases where such interest existed at the time of the loss the measure of damages remained unchanged but the market value of the whole ship must be apportioned between the owner and the

charterer in proportion to their respective interests therein; and the United States is entitled to an award on behalf of (a) the owner, if an American national at the requisite dates, in an amount equal to the price for which the ship could have been sold on the market at the time of loss *burdened with the charter*, with 5% interest thereon from November 11, 1918, or from the date of loss if destroyed at a later date, and (b) the charterer, if an American national at the requisite dates, in an amount equal to the difference if any between the said award on behalf of the owner and the reasonable market value of a free ship not burdened with the charter, with interest on the amount of this difference at the same rate and from the same date. This does not change the rule that so far as Germany is concerned her obligation is limited to making compensation for the tangible property destroyed — the ship — and that such compensation is measured by the reasonable market value of the ship at the time and place of its destruction plus interest thereon computed in accordance with the rules announced in Administrative Decision No. III. This rule for the apportionment of damages will be applied by this Commission in a case where an American-owned ship had been chartered to an alien on terms which operated to reduce its market value encumbered with the charter, and the owner's damage will be assessed at the reasonable market value of the ship so encumbered, with interest thereon. Conversely, in a case where the owner is not an American national, Germany will nevertheless be held obligated to make compensation to an American charterer to the extent of the difference, if any, between the reasonable market value of the ship free of the charter and the reasonable market value of that ship encumbered with the charter, with interest on the amount of this difference."

The *Vinland* case is also reported in 1925 A. M. C., 1141.

It is no longer so necessary that the party claiming damages shall stand in some relation of privity with the *tort feasor*, which is the burden of the decisions cited by the petitioner. A good illustration is the decision in *Johnson* v. *Cadillac Motor Car Co.*, 261 Fed. 878, where the Cadillac Company was held liable to a purchaser through a dealer for damage resulting from a defective wheel. This was reversal of the position taken on an earlier appeal in the same

case, 221 Fed. 801. The court in its later decision conformed to *Macpherson* v. *Buick Motor Co.*, 217 N. Y. 382, wherein Judge Cardozo had emphasized the necessity of taking modern development into account. See particularly the discussion of authority on pages 388-394 and also his remarks in *Glanzer* v. *Shepard*, 233 N. Y. 236, 238-242. In *Quackenbush* v. *Ford Motor Co.*, 167 App. Div. (N. Y.) 433, this doctrine was applied to damage to property.

FIFTH POINT

RECOVERY IS ALSO PROPER ON THE GROUND THAT THE RESPONDENTS WERE BENEFICIARIES OF THE SHIPOWNER'S CONTRACT WITH THE PETITIONER FOR DRY DOCKING AND REPAIRING THE STEAMER.

The petitioner's answer (VII and VIII, R. 5) shows that the dry docking of the steamer and the repairing of her cracked propeller were done to enable the shipowner to perform its charter party with the respondents. The charter party obligated the shipowner to maintain the steamer "in a thoroughly efficient state in hull and machinery" (clause 1) and provided that she should be dry docked for certain purposes, whenever charterers and master thought necessary, at least once in every six months (clause 22).

The shipowner, being without facilities of its own for doing this work, contracted with the petitioner to do the same.

This presents a clear case of one with a legal duty (here under the charter) obtaining from another a promise for the performance of work which would fulfill that duty. It is

well settled in New York and elsewhere that wherever a debt or duty is owing by a promisee to a third party, the latter may sue the promisor upon the promise. In *Vrooman* v. *Turner*, 69 N. Y. 280, 284, the Court said:

"A legal obligation or duty of the promisee to him, will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise, the obligation of the promisee furnishing an evidence of the intent of the latter to benefit him, and creating a privity by substitution with the promisor."

In *Strong* v. *American Fence Co.*, 245 N. Y. 48, the defendant in its contract with the Government for construction of a hospital undertook to furnish a surety bond "for the prompt payment to all persons or parties furnishing labor or materials required or used in the prosecution of the work". The bond was not given. The plaintiff, who supplied labor and material to a subcontractor who defaulted, was held entitled to recover damages for the defendant's breach of contract in failing to give a bond. Judge Cardozo said:

"A beneficiary of the promise, a laborer or materialman for whose protection it was given, has a right of action for the damages resulting from the breach (*Lawrence* v. *Fox*, 20 N. Y., 268; *Seaver* v. *Ransom*, 224 N. Y., 233). The promise was exacted by the promisee in fulfillment of a legal duty. It was exacted for the very purpose of assuring to the plaintiff and to others similarly situated the benefit of the security established by the statute."

In the case at bar the shipowner's contract with the petitioner was made solely for the purpose of fulfilling its duty under the charter party, which was as much a legal duty as one imposed by statute. The petitioner's ignorance of that duty at the time of contracting is immaterial, the test being the *existence* of a legal duty by the promisee to

the third party. The presence of such duty is a substitute for privity. *Vrooman* v. *Turner*, *supra*.

In *German Alliance Insurance Company* v. *Home Water Company*, 226 U. S. 220, cited by petitioner, this Court in denying recovery pointed out the absence of any obligation from the promisee to the third party in whose shoes the plaintiff stood, saying (230 231):

"Here the city was under no obligation to furnish the manufacturing company with fire protection, and this agreement was not made to pay a debt or discharge a duty to the Spartan Mills, but, like other municipal contracts, was made by Spartanburg in its corporate capacity, for its corporate advantage, and for the benefit of the inhabitants collectively."

In *Johns* v. *Wilson*, 180 U. S. 440, a grantee who had agreed with a mortgagor to pay the notes secured by the mortgage was held liable to the mortgagee for a deficiency upon the sale of the mortgaged premises.

In *National Bank* v. *Grand Lodge*, 98 U. S. 123, this Court, after stating that as a general rule privity of contract between plaintiff and defendant is necessary to the maintenance of an action of assumpsit, said:

"No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control which in equity belong to a third person."

This exception applies to the case of the petitioner which by negligent breach of its repair contract became liable for certain damages, a portion of which in equity belonged to the respondents, but have been retained by the petitioner without justification.

In *Pennsylvania Cement Co.* v. *Bradley Contracting Co.*, 7 F. (2d) 822, and in *Town of Readsboro* v. *Hoosac County*, 6 F. (2d) 733, third parties were held entitled to sue on contracts made for their benefit. These decisions referred to *Hendrick* v. *Lindsay*, 93 U. S. 143, 149, where this Court said that "the right of a party to maintain assumpsit on a promise not under seal made to another for his benefit, although much controverted, is now the prevailing rule in this country." See also *Compagnie Francaise* v. *Bonnasse*, 19 F. (2nd.) 777, 779; *Glanzer* v. *Shepard*, 233 N. Y. 236; Cardozo, *Growth of the Law*, 77 78

The shipowner's release is no bar to the respondents' claim, *Gifford* v. *Corrigan*, 117 N. Y. 257; *Knowles* v. *Ercin*, 43 Hun. 150, aff'd., 124 N. Y. 633.

SIXTH POINT

There is no lack of admiralty jurisdiction

Point V of the petitioner's brief contends that this suit is not within the admiralty jurisdiction, notwithstanding that Art. VI of the answer to the libel admitted in express words "the admiralty and maritime jurisdiction" (R. 4).

Petitioner seeks to minimize this admission by relating the same to allegations of the libel with respect to the repair contract, but taking no account of the allegations of the libel as to negligence, which negligence was also expressly recited in the answer. In the District Court the petitioner sought to make a point of the entitling of the libel in "contract and damage", but that was rejected by the District Court as without merit. See *Dampskib, etc.*, v. *Tropical Fruit Co.*, 281 Fed. 740, 742, and *The Spica*, 289 Fed. 436, 440, both of which

hold that the admiralty court will determine the controversy on the merits regardless of technicalities of pleadings or contentions as to tort or contract.

We do not quarrel with petitioner's suggestion that specific admission of jurisdiction in tort would not by itself give the admiralty court jurisdiction if it did not otherwise exist. However, in a case where jurisdiction is once admitted by the answer and thereafter denied, the court should be deaf to any but the soundest reasons for invalidating the admission or upsetting the proceedings had.

The petitioner's contention rests on the assertion that the accident happened while the vessel was in a "graving dock", which is described as differing from a floating dry dock in the fact that the ship is floated into the dock (on navigable water) and the gates then closed and the water pumped out. There is no proof in the record as to the particular character of dock, and the language in the opinion of the District Judge was taken from the petitioner's brief in that Court.

We do not see that the particular character of dock makes any difference, as with either a floating dock or a so-called graving dock a ship floats to her resting place for repairs on navigable waters which are temporarily withdrawn. This Court has not recognized any distinction, for in the case of *The Steamship Jefferson*, 215 U. S. 130, 142, it was said:

"In reason we think it cannot be held that a ship or vessel employed in navigation and commerce is any the less a maritime subject within the admiralty jurisdiction when, for the purpose of making necessary repairs to fit her for continuance in navigation, she is placed in a dry dock and the water removed from about her, *than would be such a vessel if fastened to a wharf in a dry harbor, where, by the natural recession of the water by the ebbing of the tide, she for a time might be upon dry land.*" (Italics ours.)

In *The Robert W. Parsons*, 191 U. S. 17, 33, this Court held that repairs to a vessel while in an ordinary dry dock were not made on land. *Gonsalves* v. *Morse Dry Dock Co.*, 266 U. S. 171.

In *The Anglo-Patagonian*, 235 Fed. 92, *certiorari* denied 242 U. S. 636, admiralty was held to have jurisdiction of a tort which occurred while a steamer was in a stationary dry dock which had been dredged out of the land. This is shown by the testimony of Godfrey L. Smith, Engineer for Newport News Shipbuilding and Dry Dock Company, page 42 of the Record in that case (No. 701 Oct. Term 1916). A dry dock of that Company was involved in *The Steamship Jefferson*, *supra*.

In *Butler* v. *Robins Dry Dock & Repair Company*, 240 N. Y. 23, an action against this petitioner, it was held that admiralty (instead of the Workmen's Compensation Law) had jurisdiction of a tort which occurred while the vessel was in a graving dock. There the intestate, who had been engaged in fastening plates on the ship's side, was killed by a falling plate while standing on the bottom of the dock. The Court of Appeals, following decisions of this Court which it thought did not leave the matter open to doubt, held that there was no distinction for the purpose of jurisdiction between a floating dock and the so-called graving dock to which the petitioner refers.

The Longshoremen's & Harbor Workers' Compensation Act, 44 Stat. 1424, was enacted for the purpose of giving to workers within the admiralty jurisdiction the benefits of compensation which theretofore had not been available to them under State laws. Opinion No. 1 of the Compensation Commission, acting under that statute, held that a marine railway by means of which a vessel is hauled out of the water onto the land was a dry dock within the meaning of the

statute, apparently considering it not to be doubtful that workers in a dry dock would receive compensation. 1927 A. M. C. 1550.

A dry dock of whatever kind, which exists for the repair of ships, cannot be regarded other than as an aid to navigation, and thus within the admiralty jurisdiction. See *The Blackheath*, 195 U. S. 361; *The Raithmoor*, 241 U. S. 166, 176.

The question in *The Eclipse*, 135 U. S. 599, cited by petitioner, was whether the Admiralty Court could wind up a trust or enforce a contract of sale of a vessel, and this Court held against such power.

SEVENTH POINT

SINCE THE COURTS BELOW HAD GENERAL JURISDICTION OF THE SUBJECT MATTER, THE SUIT SHOULD NOT FAIL EVEN IF IT COULD BE SAID THERE WAS A DEFECT IN ADMIRALTY JURISDICTION

In view of the decisions and considerations mentioned in our Sixth Point, we believe this Court will deny the petitioner's challenge of the admiralty jurisdiction. It is nevertheless proper to point out that even if the admiralty jurisdiction were defective, the courts below—and this Court, since an appeal in admiralty is a new trial, *Reed* v. *Fargo*, 241 U. S. 544—would have the right and power to give proper relief either at common law or in equity.

This is because the Federal courts have general jurisdiction of the subject matter and of the parties, and the amount involved exceeds $3000. Although the record does not indisputably show the citizenship of the respondents (the petitioner is a New York corporation), we are in position to

establish diversity of citizenship, as to which we respectfully refer the Court to copy of affidavit annexed hereto as an appendix.

It does not affect the general power of the Court that the suit may be either at law, in equity or in admiralty. *Beyer* v. *Lefevre*, 186 U. S. 114, 118. As early as the time of Chief Justice Marshall this Court transformed a suit mistakenly brought in admiralty to an action at law. See *The Sarah*, 8 Wheat. 391. This practice was recently followed by the Circuit Court of Appeals for the Second Circuit in *United States, etc.* v. *James W. Elwell & Co.*, 250 Fed. 939, 941, where it was held that the District Court had no jurisdiction in admiralty over a suit which had been brought to collect a penalty under the Harter Act, and that the proper procedure was an action at law, in view of which the Court proceeded as a court of law and disposed of the controversy. Judge Learned Hand said (250 Fed. at 941):

"If it were the law that under no circumstances could a libel in admiralty be amended into a complaint *qui tam* at common law, we would have no alternative but to dismiss the proceedings, but the rule we think is not so narrow. In *The Sarah*, 8 Wheat. 391, 5 L. Ed. 644, a libel in admiralty *in rem* had been filed for a forfeiture. The court held that, as the goods were seized on land, the District Court as a court of admiralty had no jurisdiction; but it did not dismiss the cause for that reason, but remanded with instructions to amend the pleadings and proceed as upon a libel of information *in rem* at common law. In the *Confiscation Cases*, 20 Wall. 92, 22 L. Ed. 320, the court treated the pleadings in a libel *in rem* in the admiralty as equivalent in all essential features to a libel of information *in rem* at common law, and affirmed the decree; there being no issues triable by jury. We see no reason why a libel *in personam* may not by analogy be treated as the analogue of a complaint *qui tam* at common law, and why it is necessary, therefore, to dismiss the cause for want of jurisdiction."

Certiorari was applied for in the *Elwell* case but was denied, 248 U. S. 564.

In the case at bar no questions are outstanding which could not properly be disposed of by this Court or either of the courts below without intervention of a jury. The petitioner expressly admitted negligence and no error was assigned to the amount of damages. The admission of the admiralty jurisdiction was held by the Circuit Court of Appeals in the case last cited to be an effective waiver of the right to assessment of damages by a jury (250 Fed. at 942).

The recent practice of this Court has been to permit any necessary amendment in this Court and dispose of the case here. *Norton* v. *Larney*, 266 U. S. 511, 516; *Realty Holding Co.* v. *Donaldson*, 268 U. S. 398, 400.

LAST POINT

It is respectfully submitted that the decree should be affirmed.

H. Alan Dawson
Burlingham, Veeder,
Masten & Fearey
Proctors for Respondents

Roscoe H. Hupper
H. Alan Dawson
William J. Dean
of Counsel

November, 1927

APPENDIX REFERRED TO AT PAGE 27.

[Title Omitted.]

UNITED STATES OF AMERICA,
State and Eastern District of Pennsylvania, } ss.
City and County of Philadelphia.

GEORGE FLINT, SAMUEL W. COLLINS and LUDWIG T. BREHM, being duly sworn according to law, depose and say that they are of full age, citizens and residents of the United States of America, and the Respondents in the above entitled cause.

George Flint further and separately deposes and says that he is a citizen of the State of Pennsylvania, and resides in Philadelphia, Pennsylvania; that at all times since a date prior to January 1st, 1917, he has been a citizen and resident of the State of Pennsylvania; and that he never has been and is not now a citizen or resident of the Southern District of New York or of the State of New York.

Samuel W. Collins further and separately deposes and says that he is a citizen of the State of New Jersey, and resides in Riverton, New Jersey; that at all times since a date prior to January 1st, 1917, he has been a citizen and resident of the State of New Jersey; and that he never has been and is not now a citizen or resident of the Southern District of New York or of the State of New York.

Ludwig T. Brehm further and separately deposes and says that he is a citizen of the State of Pennsylvania, and resides in Newtown Square, Pennsylvania; that at all times since a date prior to January 1st, 1917, he has been a citizen and resident of the State of Pennsylvania; and that he never

has been and is not now a citizen or resident of the Southern District of New York or of the State of New York.

GEORGE FLINT
SAMUEL W. COLLINS
LUDWIG T. BREHM

Sworn and subscribed to before me this 18th day of November, A. D. 1927.

H. W. BAIRD
Notary Public.
Commonwealth of Pennsylvania.
My Commission expires March 6, 1931.
[NOTARIAL SEAL.]

FILED
NOV 29 1927
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1927.

No. 102.

ROBINS DRY DOCK & REPAIR COMPANY,
Petitioner,

v.

GEORGE FLINT, SAMUEL COLLINS AND LUDWIG T. BREHM, ETC.,
Respondents.

REPLY BRIEF.

JAMES K. SYMMERS,
JOHN C. CRAWLEY,
for the Petitioner.

Law Printing Post-Job Printing Office, Inc., 154 Nassau St., New York, N. Y.

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Supreme Court of the United States

OCTOBER TERM, 1927.

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Respondents.

REPLY BRIEF.

To Respondents' First Point.

The respondents have adopted the assumption of the Circuit Court of Appeals that the shipowners might have recovered the full market value of the vessel's use during detention, but they disclaim that there was any duty on the part of the shipowners so to recover, and say that the shipowners' omission to do so is immaterial, because the respondents had at all times a direct right of action against the petitioner.

Neither *The Conqueror*, 166 U. S. 110, nor *The Potomac*, 105 U. S. 630, is authority for the proposition that the shipowners could have recovered more than their actual loss. *The North Star*, 151 Fed. 168, 175. Indeed, their actual loss, whether more or less than the market value, would seem to be the proper measure of damages in a suit against a tort feasor, and we do not agree with the respondents' assertion that the

shipowners could have recovered more than their actual loss. The principle applied by the House of Lords in *The Susquehanna*, 17 Asp. Mar. Cases, 81, is no different from the principle of our own decisions. In both *The Conqueror* and *The Potomac*, *supra*, this Court was endeavoring to ascertain the quantum of the owner's pecuniary loss, which happened, in those cases, to coincide with the market value of the ship's use. The decisions illustrate the rule of "*restitutio in integrum*".

The question is, however, not important, because the respondents here premise their suit upon the existence of a direct cause of action in tort. The facts of this case clearly give no right of action in tort, for the reasons pointed out in our original brief.

It is said that the respondents' lost profits are not legally remote, because the shipowners might have suffered this additional loss if there had been no charterparty. The law does not use that test to determine whether a given loss is remote. The line is drawn quite without reference to whether the particular loss might have been suffered by one who could have recovered it. It could as well have been argued by the appellant in *Omaha Commercial Company* v. *United States*, 261 U. S. 502, that the losses suffered by the appellant in that case were merely a part of the losses that could have been sustained by the Steel Company, and might have been recoverable by the Steel Company from the government, in the absence of the appellant's contract.

While that case and the case of *Duckett* v. *United States*, 266 U. S. 149, involved the question of "taking" under eminent domain, the facts of those two cases illustrate the difference between a right that is purely contractual (like a charterparty such as the present one) and a right that amounts to a property in the *res*. Neither a "taking" of the *res* under eminent domain, nor an unintentional injury to the *res*, infringes the legal rights of one who has no property therein.

To Respondents' Second Point.

It is said that the decision below "involves no injustice to the petitioner". The same thing might be said, of course, in a case in which a court had chosen to disregard a statute of limitations, a well founded plea of *res adjudicata* (*Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316), or any other principal of our law (*Panama R. R. Co.* v. *Rock*, 266 U. S. 209). Is "justice according to law" to be redefined as "that decision which the sitting judge will arrive at as just according to the individual conscience of the Court?" Is the suggestion not tantamount to saying that in a case wherein a Court thinks a decision guided by long established principles of law will prove a hardship to a party then "justice" is to be done according to the conscience of the Court? This notion is as old as Protagoras who taught that the individual conscience is the measure of all things—a notion that Selden says obtained in the Equity of his day and which gave rise to his saying that it was the same as if equity were measured by the length of the Chancellor's foot (*Seldeni Opera*, Vol. 3, 2027; Edition of 1726).

In *Hines* v. *Sangstad S. S. Co.*, 266 Fed. 502, referred to by respondents, the recovery was the amount of hire the charterer was obliged to pay the owner during detention. The point involved here was not considered; but it may be noted in passing that the charterer in that case might possibly be said to have stood somewhat in the position of an insurer, and accordingly his right to recover might perhaps have been based on recognized principles of subrogation. If not, we know of no legal principle that would support the decision.

In *Dominion Coal Co.* v. *Maskinonge S. S. Co.*, [1922], 2 K. B. 132, the hire paid by the government for a requisitioned vessel was held to be apportionable between the owners and the charterers; but see the judgment of Scrutton, *L. J.*, in *Elliott Steam Tug Co.* v. *Shipping Controller* [1922], 1 K. B. at pp. 139, 140, and compare *Clavecrisk*, 264 Fed. 276, at 284-5. In *The Winkfield* [1902], P. 42, the plaintiff was a bailee.

To Respondents' Third Point.

The respondents' suggestion that the respondents were "solely entitled" to the use of the steamer leaves out of account that the owners of the ship were the immediate sufferers of the lost use. The owners lost the power to use their vessel in the performance of the contract they had engaged to perform by means of the vessel. What the charterers lost was their expected profit upon their contract with the subcharterers (R. 29-30).

The respondents argue that their contract with the shipowners was "property". That is admitted; but their contract gave them no property in the ship, and for an unintended injury of the ship, resulting in an impairment of the value of their contract, the law gives them no recovery.

Respondents state that a mortgagee of a vessel may sue for collision damages, citing *The Grand Republic*, 10 Fed. 398, where a mortgagee was allowed to intervene in a suit brought by the shipowner; but a mortgage is "both a lien in equity and a conveyance at law" (*U. S. v. Commonwealth Ins. Co.*, 193 U. S. 651, 656). The respondents' charterparty was neither; it created no proprietary interest in the vessel (*Osaka v. Lumber Co.*, 260 U. S. 490).

The cases cited by the respondents as instances in which equitable relief has or might have been given to a charterer have nothing to do with the charterers' right to recover damages for an unintended injury to the vessel. On familiar principles, one who *wilfully* interferes with another's contract is guilty of a tort (*Angle v. Chicago, etc., Ry. Co.*, 151 U. S. 1, 15); hence the act that would, if consummated, amount to a tort, may be enjoined (*Butterman v. Louisville, etc., R. R. Co.*, 207 U. S. 205); but that is far from saying that a *negligent* injury of a contract right gives rise to a cause of action. The law is otherwise.

To Respondents' Fourth Point.

The decision of the Umpire of the Mixed Claims Commission in the case of the *Vinland*, proceeded to some extent upon the authority of Judge Mayer's decision in *The Aquitania*, 270 Fed. 239, and the District Court's decision in the instant case. Moreover, irrespective of the Umpire's ground of decision, the Commission was authorized to award compensation for damage to "property" by aggression, and its decision in the *Vinland* case must be considered in connection with the language and purpose of the treaty under which the Commission was acting (Treaty of Versailles, Sec. 9, Annex I to Art. 232).

Johnson v. *Cadillac Motor Car Co.*, 261 Fed. 878, and the other cases cited by the respondents under this head are based on the "dangerous instrumentality" doctrine, referred to on page 7 of our original brief. The authorities are collated in 34 A. L. R. 63, 67, and 41 A. L. R. 9. The facts of this case leave it far outside that doctrine.

To Respondents' Fifth Point.

The respondents seem to rely upon some application of the New York doctrine of *Lawrence* v. *Fox*, 20 N. Y. 268, to the facts of this case. The principle announced in that case, and followed in New York and some other jurisdictions, has not met with anything like universal approval. Moreover, the doctrine is limited, even in New York, to cases *in which the promisor has agreed to render performance to the plaintiff, either named or described in the contract*. To illustrate: if A lends money to the defendant *upon the defendant's promise to pay it to the plaintiff*, to whom A is indebted, the plaintiff may sue upon the promise as made for his benefit. But no such right exists in any case unless the defendant has agreed that the plaintiff shall be regarded as the real promisee. The rule of *Lawrence* v. *Fox* is fully discussed in *Seaver* v. *Ran-*

som, 224 N. Y. 233. In the cases there cited, and in *Strong v. American Fence Construction Co.*, 245 N. Y. 48, to which the respondents refer, the defendant, in every instance in which recovery was allowed, had undertaken to perform the contract for the benefit of the plaintiff.

In the present case the respondents were not either mentioned or referred to in the contract between the petitioner and the shipowners, nor was their existence known to the petitioner when the contract was made.

Respectfully submitted,

JAMES K. SYMMERS,
JOHN C. CRAWLEY,
for the petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 102.—October Term, 1927.

Robins Dry Dock & Repair Company, Petitioner, vs. George Flint, Samuel W. Collins and Ludwig T. Brehm, etc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 12, 1927.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a libel by time charterers of the steamship Bjornefjord against the Dry Dock Company to recover for the loss of use of the steamer between August 1 and August 15, 1917. The libellants recovered in both Courts below. 13 Fed. (2d) 3. A writ of certiorari was granted by this Court. 273 U. S. 679.

By the terms of the charter party the steamer was to be docked at least once in every six months, and payment of the hire was to be suspended until she was again in proper state for service. In accordance with these terms the vessel was delivered to the petitioner and docked, and while there the propeller was so injured by the petitioner's negligence that a new one had to be put in, thus causing the delay for which this suit is brought. The petitioner seems to have had no notice of the charter party until the delay had begun, but on August 10, 1917, was formally advised by the respondents that they should hold it liable. It settled with the owners on December 7, 1917, and received a release of all their claims.

The present libel 'in a cause of contract and damage' seems to have been brought in reliance upon an allegation that the contract for dry docking between the petitioner and the owners 'was made for the benefit of the libellants and was incidental to the aforesaid charter party' &c. But it is plain, as stated by the Circuit Court of Appeals, that the libellants, respondents here, were not parties to that contract 'or in any respect beneficiaries' and were not entitled to sue for a breach of it 'even under the most liberal rules

that permit third parties to sue on a contract made for their benefit.' 13 F. (2d) 4. 'Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, at least show that it was intended for his direct benefit.' *German Alliance Insurance Co.* v. *Home Water Supply Co.*, 226 U. S. 220, 230. Although the respondents still somewhat faintly argue the contrary this question seems to us to need no more words. But as the case has been discussed here and below without much regard to the pleadings we proceed to consider the other grounds upon which it has been thought that a recovery could be maintained.

The District Court allowed recovery on the ground that the respondents had a 'property right' in the vessel, although it is not argued that there was a demise, and the owners remained in possession. This notion also is repudiated by the Circuit Court of Appeals and rightly. The question is whether the respondents have an interest protected by the law against unintended injuries inflicted upon the vessel by third persons who know nothing of the charter. If they have, it must be worked out through their contract relations with the owners, not on the postulate that they have a right *in rem* against the ship. *Leary* v. *United States*, 14 Wall. 607. *New Orleans Belize Royal Mail & Central American Steamship Co.* v. *United States*, 239 U. S. 202.

Of course the contract of the petitioner with the owners imposed no immediate obligation upon the petitioner to third persons as we already have said, and whether the petitioner performed it promptly or with negligent delay was the business of the owners and of nobody else. But as there was a tortious damage to a chattel it is sought to connect the claim of the respondents with that in some way. The damage was material to them only as it caused the delay in making the repairs, and that delay would be a wrong to no one except for the petitioner's contract with the owners. The injury to the propeller was no wrong to the respondents but only to those to whom it belonged. But suppose that the respondent's loss flowed directly from that source. Their loss arose only through their contract with the owners—and while intentionally to bring about a breach of contract may give rise to a cause of action *Angle* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 151 U. S. 1, no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make

the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. See *National Savings Bank* v. *Ward*, 100 U. S. 195. The law does not spread its protection so far. A good statement, applicable here, will be found in *Elliott Steam Tug Co., Ltd.* v. *The Shipping Controller*, [1922] 1 K. B. 127, 139, 140. *Byrd* v. *English*, 117 Ga. 192. *The Federal No. 2*, 21 F. (2d) 313.

The decision of the Circuit Court of Appeals seems to have been influenced by the consideration that if the whole loss occasioned by keeping a vessel out of use were recovered and divided a part would go to the respondents. It seems to have been thought that perhaps the whole might have been recovered by the owners, that in that event the owners would have been trustees for the respondents to the extent of the respondents' share, and that no injustice would be done to allow the respondents to recover their share by direct suit. But justice does not permit that the petitioner be charged with the full value of the loss of use unless there is some one who has a claim to it as against the petitioner. The respondents have no claim either in contract or in tort, and they cannot get a standing by the suggestion that if some one else had recovered it he would have been bound to pay over a part by reason of his personal relations with the respondents. The whole notion of such a recovery is based on the supposed analogy of bailees who if allowed to recover the whole are chargeable over, on what has been thought to be a misunderstanding of the old law that the bailees alone could sue for a conversion and were answerable over for the chattel to their bailor. Whether this view be historically correct or not there is no analogy to the present case when the owner recovers upon a contract for damage and delay. *The Winkfield*, [1902] P. 42. *Brewster* v. *Warner*, 136 Mass. 57, 59.

Decree reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.